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QUESTION OF THE VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN ANY PART OF THE WORLD, WITH PARTICULAR REFERENCE TO COLONIAL AND OTHER DEPENDENT COUNTRIES AND TERRITORIES

Extrajudicial, summary or arbitrary executions

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Bacre Waly Ndiaye, submitted pursuant to Commission resolution 1997/61

Addendum

Mission to the United States of America

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Introduction

1. The Special Rapporteur on extrajudicial, summary or arbitrary executions visited the United States of America from 21 September to 8 October 1997. The visit took place following several requests by the Special Rapporteur to the United States Government for an invitation. By letter dated 23 September 1994, the Special Rapporteur inquired whether the Government of the United States would consider inviting him to carry out a visit. By letter dated 25 September 1995, the Special Rapporteur reiterated his request. By letter dated 2 September 1996, the Special Rapporteur expressed concern that no reply had yet been received to his previous communications of 1994 and 1995 and reiterated his interest in conducting a mission to the United States. The invitation to visit the country was given orally to the Special Rapporteur on 8 October 1996 during a meeting held in Geneva with representatives of the Permanent Mission of the United States. The invitation was confirmed in writing by letter dated 17 October 1996.

2. The request for a visit to the United States was based on persistent reports suggesting that the guarantees and safeguards set forth in international instruments relating to fair trial procedures and specific restrictions on the death penalty were not being fully observed. Since his appointment in 1992, the Special Rapporteur has received information concerning a discriminatory and arbitrary use of the death penalty and a lack of adequate defence during trial and appeal procedures in the United States. Executions of juveniles and mentally retarded persons have also been a constant concern for the Special Rapporteur. In addition, information concerning the extension of the scope and the reintroduction of death penalty statutes in several states prompted the Special Rapporteur to request a visit to the United States.

3. The basis for the Special Rapporteur's work in the field of capital punishment lies in several resolutions of the Commission on Human Rights 1/ in which the Commission requested the Special Rapporteur "to continue monitoring the implementation of existing international standards on safeguards and restrictions relating to the imposition of the death penalty, bearing in mind the comments made by the Human Rights Committee in its interpretation of article 6 of the International Covenant on Civil and Political Rights, as well as the Second Optional Protocol thereto".

4. Although the main concern of the Special Rapporteur in requesting a visit to the United States was the application of the death penalty, other aspects of his mandate could not be ignored, in particular because reports of deaths in custody and deaths due to excessive use of force by law enforcement officials in the United States were also received by the Special Rapporteur.

5. From 21 September to 8 October 1997, in addition to Washington, D.C., the Special Rapporteur visited the States of New York, Florida, Texas and California. During his visit he met with federal and state authorities. In Washington, D.C. he met with the Deputy Assistant Secretary for Human Rights and other representatives of the Department of State, as well as with representatives from the Department of Justice, and several members of Congress. In New York, he met with the Chief Judge of the New York State Court of Appeals, the District Attorney for Bronx County, the Deputy Police

Commissioner on Legal Matters and Representatives of the New York Capital Defenders Office. In addition, he also met with the former Governor of New York State, Mario Cuomo. In Florida, he met with the State Attorney, representatives of the Office of the Public Defender and the Chief of Police of Miami. During his stay in Texas, he held meetings with the Governor and his assistant on legal matters, representatives of the Office of the Attorney General in Austin and representatives of the Office of the District Attorney in Houston. He also met with the Consul of Mexico in Houston. In California, he met with the Court Administrator of the California Supreme Court, the San Francisco Assistant Chief of Police, as well as with the Chief of Police of Los Angeles. The Special Rapporteur wishes to thank state authorities, and particularly former Governor Cuomo and Governor Bush, for their availability and cooperation with his visit.

6. The Special Rapporteur met with prison authorities in Huntsville, Texas, and in San Quentin, California. He had full access to the Ellis Death Row Unit in Huntsville and was able to meet with all the death row inmates he had requested to meet. In San Quentin, prison authorities offered the Special Rapporteur the possibility of meeting with three death row inmates other than those he had requested to see. The Special Rapporteur did not consider those conditions acceptable and therefore declined the offer. He nevertheless visited the premises of the prison. His repeated requests to visit women on death row in Broward Correctional Institution, Florida, remained unanswered.

7. In addition, the Special Rapporteur had the opportunity to meet with many non-governmental sources, including lawyers representing persons on death row, victims' families, experts on death penalty issues, specialists on juvenile justice and mental retardation, university professors and criminologists. He also met with representatives of non-governmental organizations such as the American Civil Liberties Union, the American Friends Service Committee, the Anthony Baez Foundation, Amnesty International-United States Section, the Death Penalty Information Center, the December 12th Movement, the California Appellate Project, the Ella Baker Center for Human Rights, Human Rights Watch, the International Human Rights Law Group, the International Association against Torture, the National Coalition to Abolish the Death Penalty, the NACCP Legal Defense Fund, New York Lawyers Against the Death Penalty, Parents Against Police Brutality, the Southern Region Rainbow Coalition, the Texas Coalition to Abolish the Death Penalty and the Texas Defender Service.

8. The Special Rapporteur wishes to thank the International Human Rights Law Group in Washington, D.C. for the assistance provided during his mission. Further, he would like to express his gratitude to Human Rights Watch, whose assistance in the organization of appointments at a non-governmental level was highly appreciated. He also wishes to thank the December 12th Movement for organizing public hearings on police violence in New York, as well as those NGOs and individuals who publicly testified during the hearing.

9. Despite the official invitation from the United States Government and its agreement on the dates, many difficulties arose in the organization of official meetings for the mission. The Department of State was only willing to provide assistance in arranging meetings at the federal level, but maintained it had no authority to facilitate the visit at state level. The

Special Rapporteur regrets that none of the high-level meetings he requested at the federal level were arranged. In view of the above, he transmitted a letter dated 18 September 1997 to the United Nations High Commissioner for Human Rights expressing his concern at the obstacles his mission was facing. Official meetings at the state level were organized by the Office of the High Commissioner for Human Rights in Geneva and New York as well as by the United Nations Information Center (UNIC) in Washington, D.C.

10. The Special Rapporteur wishes to thank the Department of State for its efforts in trying to facilitate access for him to state prisons. Thus, by letters dated 22 September 1997, the Department of State requested prison authorities at Broward Correctional Institution in Florida, Huntsville in Texas, and San Quentin in California to cooperate with the visit of the Special Rapporteur.

I. THE RIGHT TO LIFE IN INTERNATIONAL LAW

11. The right to life is the supreme right, because without it, no other rights can be enjoyed. International law recognizes the right to life as a fundamental and non-derogable right. The death penalty is an exception to the right to life and, like any exception, it must be interpreted restrictively and carried out with the most scrupulous attention to fundamental principles of non-discrimination, fair trial standards and equal protection before the law. There is no right to capital punishment, and while Governments have the right to enact penal laws, these laws must conform to basic principles of international human rights law.

12. The supremacy of the right to life and the exceptional character of the death penalty are enshrined in several international instruments. Article 3 of the Universal Declaration of Human Rights and article 6 of the International Covenant on Civil and Political Rights (ICCPR) provide that every individual has the right to life and security of the person, that this right shall be protected by law and that no one shall be arbitrarily deprived of his or her life.

13. Although the death penalty is not yet prohibited under international law, the desirability of its abolition has been strongly reaffirmed on different occasions by United Nations organs and bodies in the field of human rights, inter alia by the Security Council, 2/ the Human Rights Committee, 3/ the General Assembly 4/ and the Economic and Social Council. 5/

14. Another recent indication of the increasing trend towards abolition of the death penalty can be seen in Commission on Human Rights resolution 1997/12 on the question of the death penalty. For the first time, the Commission on Human Rights adopted a resolution on capital punishment in which it called upon all States "that have not yet abolished the death penalty progressively to restrict the number of offences for which the death penalty may be imposed". It further called on States to consider suspending executions, with a view to abolishing the death penalty.

15. The gradual move within the United Nations to a position favouring the abolition of the death penalty was already observed in the reports on United Nations norms and guidelines in criminal justice: from

standard-setting to implementation (A/CONF.87/8) and on capital punishment (A/CONF.87/9) presented to the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1980. The reports noted that the United Nations had gradually shifted from the position of a neutral observer, concerned about but not committed on the question of the death penalty, to a position favouring the eventual abolition of the death penalty.

16. Three treaties aiming at the abolition of the death penalty further confirm the tendency of the international community towards abolishing the death penalty: the Second Optional Protocol to the International Covenant on Civil and Political Rights; the Protocol to the American Convention on Human Rights to Abolish the Death Penalty; and the Protocol No. 6 to the European Convention on Human Rights.

A. The International Covenant on Civil and Political Rights: limitations on the imposition of the death penalty

17. The International Covenant on Civil and Political Rights and its first Optional Protocol, 6/ were adopted in 1966 by the General Assembly. The ICCPR came into force 10 years later, on 23 March 1976. By ratifying the ICCPR, a State accepts the obligation to give the force of law to the rights proclaimed by the Covenant. Civil and political rights enshrined in the International Covenant include, inter alia, the right to non-discrimination, the right to be treated equally before the law, the right to a fair trial, the right not to be submitted to torture, and the right to life. The object of the Covenant is the creation of minimum legally binding standards for human rights which, according to article 50 of the Covenant, shall extend to all parts of federal States without any limitation or exception. The United States of America ratified the ICCPR on 8 June 1992, with a package of reservations, declarations and understandings. On 8 September 1992, the treaty came into force for the United States.

18. Article 6 (1) of the ICCPR states that the right to life is an inherent right. The term "inherent right" was understood, during the drafting of the Covenant, as a right which is not conferred on a person by society but "rather that society is obliged to protect the right to life of an individual". 7/ It further stipulates that no one shall be arbitrarily deprived of his life. The concept of arbitrariness cannot be equated to "against the law", but has to be interpreted more broadly, to include the notion of inappropriateness and injustice. 8/ While the United States entered general reservations to article 6, no specific reservation was entered to article 6 (1) of the ICCPR (see paras. 27-35 below).

19. After setting out the general protection of the right to life, article 6 (2) indicates the conditions, in those countries where it has not been abolished, for imposing the death penalty. Article 6 (2), as an exception to the inherent right to life, should not be interpreted as authorizing the imposition of the death penalty in general, but only for those countries where it has not yet been abolished. It is the opinion of the Special Rapporteur that the negative wording of the article does not allow for the reinstatement of the death penalty after it has been abolished. The intent of this provision does not allow for the expansion of the scope of the

death penalty. In this context, the Human Rights Committee has expressed the view that the extension of the scope of application of the death penalty raised questions as to the compatibility with article 6. 9/

20. Other limitations imposed by article 6 of the ICCPR are the following.

21. A sentence of death can only be imposed for the most serious crimes. The Human Rights Committee considers that this expression "must be read restrictively to mean that the death penalty should be a quite exceptional measure". 10/ The notion of most serious crimes was later developed in the Safeguards guaranteeing protection of the rights of those facing the death penalty, according to which the most serious crimes are those "intentional crimes with lethal or other extremely grave consequences". The Special Rapporteur considers that the term "intentional" should be equated to premeditation and should be understood as deliberate intention to kill.

22. A sentence of death can only be imposed following the strictest observance of the highest procedural safeguards. An indisputable characteristic of the death penalty is its irreversibility. The Special Rapporteur, therefore, believes that the highest fair trial guarantees must be fully observed in trials leading to its imposition. He holds the opinion that all safeguards and due process guarantees must be fully respected, both during the pre-trial and trial, as provided for by the ICCPR and various other international instruments. 11/ Article 6 (2) clearly states that the penalty of death can only be carried out pursuant to a final judgement rendered by a competent court. Article 6 (4) provides for the right to seek pardon or commutation.

23. Article 14 of the Covenant, which sets the basic fair trial standards, includes the right to equality before the courts, the right to a fair and public hearing by a competent, independent and impartial tribunal established by law, the right to the presumption of innocence, the right to appeal and the right to be compensated in case of miscarriage of justice. Article 14 (3) lists the minimum fair trial guarantees, which include the right to be informed promptly of the nature and cause of the charge, the right to have adequate time and facilities for the preparation of one's defence and to communicate with counsel of one's own choosing. The Committee has expressed the view that the "requirements of paragraph 3 are minimum guarantees, the observance of which is not always sufficient to ensure the fairness of a hearing ...". 12/ In addition, the Human Rights Committee considers that "the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected, and which could no longer be remedied by appeal, constitutes a violation of article 6 of the Covenant". 13/

24. A sentence of death cannot be imposed on minors and cannot be carried out on pregnant women. International law prohibits the imposition of the death penalty on juvenile offenders. Article 6 (5) of the ICCPR provides that the death penalty shall not be imposed for crimes committed by persons below 18 years of age. This principle has been repeated in article 37 (a) of the Convention on the Rights of the Child, rule 17.2 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") and paragraph 3 of the Safeguards guaranteeing protection of

the rights of those facing the death penalty. Also, article 6 (4) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), stipulates that the death penalty shall not be pronounced on persons who were under 18 years of age at the time they committed the offence.

25. In addition to the ICCPR, other international instruments ratified by the United States include the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention on the Elimination of All Forms of Racial Discrimination. The United States has also signed, but not ratified, the Convention on the Rights of the Child. The Convention on the Rights of the Child has been universally ratified, except by two countries: the United States of America and Somalia.

26. Further, the United States has signed, but not ratified, the American Convention on Human Rights, which also forbids the imposition of the death penalty on juvenile offenders.

B. Reservations by the United States to the ICCPR and the position of the Human Rights Committee

27. At the time of ratification of the ICCPR, the United States entered reservations concerning certain rights contained in the Covenant. By entering a reservation, a State purports to exclude or modify the legal effect of a particular provision of the treaty in its application to that State. According to the Vienna Convention on the Law of Treaties, reservations to multilateral treaties are allowed, providing that the reservation is compatible with the object and purpose of the treaty itself. One of the reservations entered by the United States makes particular reference to the death penalty provision of article 6.

28. According to this reservation, "the United States reserves the right, subject to its constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below 18 years of age". 14/

29. In its concluding observations to the initial report of the United States of America (CCPR/81/Add.4), the Human Rights Committee expressed concern at this reservation which it believes to be incompatible with the object and purpose of the ICCPR. 15/

30. It is the view of the Special Rapporteur that this reservation leaves open the possibility of executing persons with mental retardation. Further, he is of the opinion that the term "future", under the notion of "existing or future laws permitting the imposition of capital punishment" is not compatible with the restrictive spirit of article 6 of the ICCPR. 16/

31. Eleven States parties to the ICCPR objected to the reservation entered by the United States. 17/ The Human Rights Committee states that the content and scope of reservations may "undermine the effective implementation of the Covenant and tend to weaken respect for the obligations of States

parties". 18/ It also states that the absence of a prohibition on reservations (reservations are not prohibited by the Covenant) "does not mean that any reservation is permitted". 19/

32. Further, according to the Committee, "The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation. 20/ In addition, as article 4 of the Covenant declares article 6 to be a non-derogable right, a State which makes a reservation to such a right is under a "heavy onus". 21/

33. The United States also entered an understanding, according to which the Covenant "shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the State and local Governments". The Special Rapporteur considers that nothing in this understanding precludes Federal and State Governments from making the necessary efforts to implement the Covenant throughout the country. Further, he is of the opinion that the federal structure should not be an obstacle to the implementation of the Covenant.

34. The United States also made several declarations. It declared "that the provisions of articles 1 through 27 of the Covenant are not self-executing". In its initial report to the Human Rights Committee, the United States explained that this declaration does not limit the international obligations of the United States; rather, it meant that, as a matter of domestic law, the Covenant did not, by itself, create private rights directly enforceable in United States courts. Further, according to the United States report, fundamental rights and freedoms protected by the ICCPR are already guaranteed in United States law, either by virtue of constitutional protections or enacted statutes, and can be effectively asserted and enforced by individuals in the judicial system on those bases. For those reasons, it was not considered necessary to adopt special implementing legislation to give effect to the provisions of the ICCPR in domestic law.

35. In its concluding observations on the initial report of the United States of America, the Human Rights Committee regretted the extent of the reservations, declarations and understandings to the Covenant as, taken together, they intended to ensure that the United States has accepted only what is already the law of the United States.

C. Other restrictions imposed by international law

36. Imposition of the death penalty on mentally retarded or insane persons is also prohibited. Paragraph 6 of the Declaration of the Rights of Mentally Retarded Persons, 22/ provides that, if prosecuted for any offence, a mentally retarded person shall have the right to due process of law with full recognition of his degree of mental responsibility. Further, paragraph 3 of the Safeguards guaranteeing protection of the rights of those facing the death penalty stipulates that the death penalty shall not be carried out on persons who have become insane. In addition, in paragraph 1 (d) of resolution 1989/64 on implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, the Economic and Social Council recommended

that States strengthen further the protection of the rights of those facing the death penalty by eliminating the death penalty for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution.

II. THE GENERAL CONTEXT OF THE DEATH PENALTY IN THE UNITED STATES

37. Currently, 40 jurisdictions in the United States of America have death penalty statutes. 23/ Thirteen other jurisdictions do not. 24/ According to the information received, 3,269 persons are on death row, 25/ of whom 47.05 per cent are White, 40.99 per cent are Black, 6.94 per cent are Hispanic, 1.41 per cent are Native American, and 0.70 per cent are Asian. Of the total death row population, more than 98 per cent are male.

38. Since the death penalty was reinstated in 1976, 403 persons have been executed. 26/ There have been no federal executions since 1963. Out of these 403 executions, only 6 white persons have reportedly been executed for the murder of a black person. 27/ Texas has been responsible for more than 30 per cent of the executions, followed by Virginia (10.17 per cent) and Florida (9.68 per cent). It is reported that since the reinstatement of death penalty statutes, more than 47 persons have been released from death row because of later evidence of their innocence (see paras. 115-116 below).

39. One hundred and fourteen women have reportedly been sentenced to death from 1973 to June 1997. Of them 47 are on death row and 66 had their sentences either reversed or commuted to life imprisonment. Florida, North Carolina and Texas account for the highest imposition of female death sentences. 28/ Female executions have been rare. The last woman executed was in 1984 in North Carolina.

40. Nine juvenile offenders, individuals aged less than 18 at the time they committed the crime for which they were convicted, have been executed. 29/

41. In 1972, the Supreme Court found the application of the death penalty unconstitutional and invalidated both federal and state-level death penalty statutes. In Furman v. Georgia (1972), the United States Supreme Court ruled that the existing death penalty laws were being applied in an arbitrary and capricious manner, which violated the Constitution. Justice White, in his concurring opinion in the Furman case, stated that with respect to the death penalty "there was no meaningful basis for distinguishing the few cases in which it was imposed from the many cases in which it was not". In Gregg v. Georgia (1976), the Supreme Court ruled that the death penalty did not violate the Constitution if it was administered in a manner designed to protect against arbitrariness and discrimination. This ruling was used by the states, and eventually the Federal Government, to reintroduce the death penalty in accordance with certain guidelines and provisions aimed at eliminating arbitrariness.

42. However, information brought to the attention of the Special Rapporteur indicates that a significant degree of unfairness and arbitrariness in the administration of the death penalty 25 years after Furman appears to still prevail. In this context, in February 1997, the American Bar Association (ABA) called for a moratorium on executions in the United States until

jurisdictions implement procedures and policies intended to ensure that death penalty cases are administered fairly and impartially, in accordance with due process. 30/

43. It was brought to the Special Rapporteur's attention that the guarantee of due process in capital cases has been seriously jeopardized following the adoption of the federal 1996 Anti-Terrorism and Effective Death Penalty Act. This law severely limits federal review of state court convictions and curtails the availability of habeas corpus at the federal level. In addition, the withdrawal of funding for post-conviction defender organizations, which were handling capital punishment cases at the post-conviction level and helping attorneys involved in death penalty cases, seriously limits the extent to which fair trial standards are fully available during the process leading to the imposition of a death sentence.

III. FINDINGS OF THE SPECIAL RAPPORTEUR

A. Current practices in the application of the death penalty

1. Reintroduction of death penalty statutes and extension of the scope

44. The Special Rapporteur has observed a tendency to increase the application of the death penalty both at the state level, either by reinstating the death penalty or by increasing the number of aggravating circumstances, and at the federal level, where the scope of this punishment has recently been dramatically extended.

45. The States of Kansas and New York reinstated the death penalty in 1994 and 1995, respectively. On 7 March 1995, New York became the thirty-eighth state to reinstate the death penalty. The bill, signed by Governor Pataki of New York, came into force on 1 September 1995. According to information received, Governor Pataki reportedly referred to the prevention of violent crime as a justification for the new law. However, during a meeting with the Bronx District Attorney, the Special Rapporteur was informed that from 663 homicides committed in the Bronx in 1990, the figure had gradually lowered in subsequent years, to reach 249 in 1996. Since the reinstatement of the death penalty in New York, 15 persons are said to have been charged with capital murder.

46. The Special Rapporteur has recently been informed that a proposal to reinstate the death penalty in Washington, D.C. for those convicted of killing law enforcement officials is expected to be considered by the Senate at the beginning of 1998.

47. In the past several years, a number of States, including Alabama, Colorado, Delaware, Georgia, Indiana, New Hampshire, North Carolina and Tennessee, have enacted laws which increased the number of aggravating circumstances which qualify a murder as a capital case. 31/ In Florida, the legislature has, since 1972, expanded the number of aggravating circumstances from 8 to 14. By increasing the number of aggravating circumstances states are widening the scope of the death penalty.

48. Similarly, at the federal level, several legislative developments have led to an expansion of the scope of the death penalty. Following the reintroduction of the federal death penalty in 1988 through the Anti-Drug Abuse Act, another law, the Federal Death Penalty Act, was signed into law by the President on 13 September 1994. This new law expanded the federal death penalty to more than 50 new offences. The law provides for the death penalty in a range of crimes involving murder of federal officials. The death penalty could also be applied for non-homicidal offences such as attempted assassination of the President, treason, espionage and major drug-trafficking. 32/

2. Execution of juveniles

49. International law prohibits the imposition of a death sentence on juvenile offenders (those who committed the crime while under 18 years of age). The consensus of the international community in this respect is reflected in the wide range of international legal instruments (see para. 24 above). On 27 March 1987, the Inter-American Commission on Human Rights declared that the United States had violated provisions of the American Convention on Human Rights by permitting the execution of two juvenile offenders, even though, having signed the Convention, it had not ratified it. The Commission recognized the existence among the member States of the Organization of American States of a regional jus cogens norm prohibiting the execution of juvenile offenders and referred to the emergence of a norm of customary international law establishing 18 as the minimum age for imposition of the death penalty.

50. Despite this clear recognition of the prohibition of executing juvenile offenders, the United States of America is one of the few countries whose legislation allows for the imposition of the death penalty on and execution of juveniles. In a letter sent by the United States Government to the Special Rapporteur on 22 September 1993, the Government acknowledged a difference between United States law and international law: "The United States Government realizes that its law differs from the International Covenant on Civil and Political Rights on this point. This difference in law was the basis for a reservation to the United States ratification of the Covenant."

51. Out of the 38 states with death penalty statutes, 14 provide that 18 is the minimum age for execution. In 4 states, 17 is the minimum age, while in 21 other states, 16 is the minimum age. According to the information received, 47 offenders who committed the crimes before the age of 18 are currently on death row. At the federal level, the imposition of the death penalty on juvenile offenders is not permitted.

52. In Thompson v. Oklahoma (1988), the Supreme Court ruled that it was unconstitutional to impose the death penalty on a person who was under 16 years of age at the time of commission of the crime. In Stanford v. Kentucky, the Supreme Court ruled that it was constitutional to impose the death penalty on an offender who was aged 16 at the time of commission of the crime.

53. Although the United States of America has not executed any juvenile offenders while still under 18, it is one of the few countries, together with

the Islamic Republic of Iran, Pakistan, Saudi Arabia and Yemen, to execute persons who were under 18 years of age at the time they committed the crime. Charles Rumbaugh was the first juvenile offender executed in the United States since the reinstatement of the death penalty in 1976. He was executed in Texas in September 1985. The last one, Christopher Burger, was executed in Georgia in December 1993.

54. In a capital case, age should be regarded as a mitigating factor. In Eddings v. Oklahoma (1982), the Supreme Court ruled that the "chronological age of a minor is itself a relevant mitigating factor of great weight". However, the Special Rapporteur was informed that in some capital cases concerning juvenile offenders, age was not presented as a mitigating factor at the sentencing phase of the trial. In this context, he was informed that during the trial in Texas of Robert Anthony Carter, an African-American juvenile offender charged with murder and with no prior criminal record, the jury was not invited to consider his age as mitigating evidence. By letter dated 8 February 1993, the United States Government informed the Special Rapporteur that the death penalty is available in juvenile cases "only when the court has determined to try the defendants as adults". However, the Special Rapporteur was informed that in practice in some states whose laws allow for persons under 18 to face the death penalty, minors charged with aggravated murder are very often tried in adult courts.

55. The Special Rapporteur wishes to emphasize that international law clearly indicates a prohibition of imposing a death sentence on juvenile offenders. Therefore, it is not only the execution of a juvenile offender which constitutes a violation of international law, but also the imposition of a sentence of death on a juvenile offender by itself. Accordingly, the Criminal Justice Section of the ABA, in August 1983, adopted a resolution calling for the abolition of the imposition of the death penalty for juveniles.

56. Since his appointment, the Special Rapporteur has intervened on behalf of the following juvenile offenders: Johnny Franck Garrett, executed in Texas in February 1992; Christopher Burger, executed in Georgia in December 1993; and Azikiwe Kambule, a 17-year-old South African national reportedly facing charges of first-degree murder in Mississippi. The Special Rapporteur was informed that on June 1997 Azikiwe Kambule was sentenced to a term of 35 years in prison on charges of "car jacking and accessory after the fact of murder".

3. Executions of persons with mental retardation

57. According to information received from non-governmental sources, at least 29 persons with severe mental disabilities have been executed in the United States since the death penalty was reinstated in 1976. 33/ Twenty-eight capital jurisdictions are said to permit the execution of mentally retarded defendants. Eleven death penalty states, 34/ and the Federal Government, prohibit the execution of mentally retarded persons.

58. Because of the nature of mental retardation, mentally retarded persons are much more vulnerable to manipulation during arrest, interrogation and confession. Moreover, mental retardation appears not to be compatible with

the principle of full criminal responsibility. The Special Rapporteur believes that mental retardation should at least be considered as a mitigating circumstance.

59. On 7 February 1989, the ABA adopted a resolution urging that no person with mental retardation, as defined by the American Association on Mental Retardation, 35/ should be sentenced to death and executed. It further resolved that the ABA supports enactment of legislation barring the execution of those individuals with mental retardation.

60. The Special Rapporteur has intervened, inter alia, on behalf of Emile Duhamel, reportedly suffering from severe mental retardation and unable to understand the nature of the proceedings against him. The Special Rapporteur met Emile Duhamel while visiting death row inmates in Huntsville, Texas.

B. The administration of the death penalty

61. A death sentence may be imposed both at the federal and state levels. The majority of death penalty sentences are imposed at the state level. Each capital punishment state has its own statute and each state determines how the death penalty will be administrated within the state. However, only a very small proportion of murders result in a sentence of death.

62. It is to be noted that the small percentage of defendants who receive a death sentence are not necessarily those who committed the most heinous crimes. Many factors, other than the crime itself, appear to influence the imposition of a death sentence. Class, race and economic status, both of the victim and the defendant, are said to be key elements. It is alleged that those who are able to afford good legal representation have less chance of being sentenced to death. The influence of public opinion and political pressure cannot be disregarded either. In addition, racial attitudes of lawyers, prosecutors, juries and judges, although not necessarily conscious, are also believed to play a role in determining who will, or who will not, receive a death sentence. Supreme Court Justice Blackmun, in his dissenting opinion in Callins v. Collins (1994) made reference to this problem stating that "(...) the death penalty remains fraught with arbitrariness, discrimination, caprice and mistake". He also stated that "Even under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die".

63. Allegations of racial discrimination in the imposition of death sentences are particularly serious in southern states, such as Alabama, Florida, Louisiana, Mississippi, Georgia and Texas, known as the "death penalty belt". The Special Rapporteur was informed that a discriminatory imposition of capital sentences may be favoured by the composition of the judiciary: in Alabama, only 1 of the 67 elected district attorneys is said to be black, and none of Georgia's 159 counties is reported to have a black district attorney. The majority of judges in these states are also reported to be white. 36/

64. In one of the most prominent related rulings, McCleskey v. Kemp (1987), the Supreme Court considered racial disparities as "an inevitable part of our

criminal justice system". In this case, evidence of racial discrimination was based on a study, known as the Baldus Study, which showed that in Georgia, defendants who killed white victims were more than four times as likely to get the death penalty than those who killed Blacks. The Court held that studies demonstrating statistically that the death penalty was racially discriminatory were not sufficient, and that each defendant had to prove the existence of racial bias in his case and present "exceptionally clear proof" that "the decision makers in his case acted with discriminatory purpose".

65. This ruling has had the effect of allowing the courts to tolerate racial bias because of the great difficulties defendants face in proving individual acts of discrimination in their cases. The Supreme Court has maintained that direct, purposeful discrimination may always support a challenge to a capital conviction, but that statistical evidence alone demonstrating indirect discrimination may not, in itself, be sufficient grounds for a constitutional challenge. Doubts are raised about the compatibility of this ruling with obligations undertaken under the International Convention on the Elimination of All Forms of Racial Discrimination, which requires States parties to take appropriate steps to eliminate both direct and undirect discrimination.

66. Some reports have reached the conclusion that a pattern of racial discrimination exists in the United States justice system. 37/ In his report on his mission to the United States (E/CN.4/1995/78/Add.1), the United Nations Special Rapporteur on contemporary forms of racism, Maurice Glèlè Ahanhanzo, stated that "Racial factors affect the judicial process, from the moment of arrest right through to the trial" (para. 60). He concluded that for similar offences or crimes, ethnic minorities are more likely to receive a harsher penalty than a white. According to the Special Rapporteur, "this imbalance is also the result of the inadequate representation of ethnic minorities on juries".

67. The Racial Justice Act was passed by the House of Representatives as an amendment to the 1994 Crime Bill, but was rejected in the Senate. The Act would have allowed the defendant to introduce evidence of racism by the use of statistics and would have removed the need to prove discriminatory intent on the part of any specific individual or institutions. Thus, it would have set in place a system for challenging racially discriminatory sentences. Without the Racial Justice Act, defendants have a very high burden of proving intentional discrimination in their case in order to succeed on appeal.

68. Other elements which may have a direct or indirect influence in the determination and imposition of a death sentence are discussed below.

1. The judiciary

69. Federal judges are appointed for lite. At the state level, in only 6 of the 38 death penalty states are judges appointed for life by the state governor. 38/ In the other 32 states, judges are subject to election.

70. The possibility of elected or appointed judges is recognized in principle 12 of the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1985 and endorsed by the General Assembly in

resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. No matter what system is being used, the judiciary shall decide matters impartially, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect (principle 2).

71. Many sources have expressed concern as to whether the election of judges puts their independence at risk. In its concluding observations to the United States report, the Human Rights Committee expressed its concern about the impact which the current system of election of judges may, in a few states, have on the implementation of the rights provided under article 14 of the ICCPR.

72. During his mission, the Special Rapporteur held meetings with several lawyers and members of the bar in different states who acknowledged having received letters from judges requesting financial contributions for their campaigns for re-election. It is difficult to determine the influence that the electorate and a financial contribution to an election campaign may have on a judge. While in most cases it will depend on the degree of integrity of the individual judge, it is certain that this situation exposes the judge to a higher level of pressure than those who, like federal judges, hold life tenures, do not have to run for re-election and are not accountable to volatile public opinion. The situation has become of serious concern in death penalty cases, particularly because state judges, in view of the recent legislative developments which minimize federal review of state court decisions, are making decisions with considerably less opportunities for review.

73. The concern becomes even more significant in those states where judges have the possibility of overriding the decision of a jury, such as in Alabama, Delaware, Florida and Indiana. It is alleged that because of public support for the death penalty, some judges may not dare to override or overturn a death sentence in fear of the repercussions this may have on his/her professional career. According to the information received, in Alabama, about 25 per cent of persons on death row were said to have been recommended for life sentences by their juries but the judge overrode the decision. 39/ In Florida, Alabama and Indiana, judges are alleged to have imposed death sentences in a total of 189 cases in which the jury recommended life imprisonment, death recommendations were said to have been reversed in 60 cases. 40/

74. According to information brought to the attention of the Special Rapporteur, it is very difficult for a judge who has reservations regarding the death penalty to be re-elected. In state judicial elections, judges have been attacked for their decisions in death penalty cases. Mississippi Supreme Court Justice James Robertson was defeated in his 1992 campaign allegedly for having overturned death sentences. He was said to have been aggressively attacked in this respect by prosecutors and victims rights groups. Justice Penny White, of Tennessee's Supreme Court, was not re-elected for having voted for the overturning of a death sentence, allegedly after finding insufficient evidence to uphold the sentence. Reportedly, she was attacked during the judicial elections in August 1996 for her opposition to the death penalty. In 1994, Judge Charles Campbell was reportedly voted off the Texas Court of Criminal Appeals after a reversal in a capital case.

In 1992, Judge Norman Lanford was also voted off the State District Court in Texas following his recommendation that a death sentence be overturned due to prosecutorial misconduct. 41/

75. The Special Rapporteur wishes to emphasize that the election of judges does not necessarily influence the outcome of judicial decisions. However, the lack of financial transparency during election campaigns and the short duration of terms make judges more exposed to pressure, which may jeopardize their independence or impartiality. Increasing the length of judicial terms, as well as strict public control on fund-raising in judicial elections, would reduce the risk of unduly influencing judges.

2. Prosecutorial discretion

76. Prosecutors have great discretionary powers in determining in which cases to seek the death penalty. In all murder cases in which the death penalty may be sought (because the case appears to meet the aggravated factors set out in the state statutes as sufficient for capital murder), the prosecutor has the unreviewable discretion to decide to proceed with a capital charge or not. No state sets out additional guidance as to when the prosecutor should seek death. In some statutes, like that in Florida, aggravating factors making a murder eligible for capital murder may be as vague as "especially heinous". Because of this discretion, some prosecutors will seek the death penalty almost all the time while others, in similar cases, will not.

77. The Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990, make specific reference to the discretionary powers of the prosecutor. Guideline 17 provides that when prosecutors are vested with discretion, the law shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process.

78. The fact that a death sentence is not mandatorily sought by the prosecutor, and that he/she exercises discretion in deciding whether to seek it or not, may mean that, in fact, the death penalty is sought less often. However, on the other hand, this same discretion allows that for similar cases the decision of the prosecutor can be different, therefore increasing the risk of arbitrariness and bringing a sense of unfairness to those who are "picked out" to be prosecuted as death penalty cases. The question to be raised here is: Where is the borderline between life and death?

79. An example of arbitrariness caused by this discretion can be seen by analysing the death row population in Texas. As of June 1997, the sentences of 136 persons on death row originated from Harris County, followed by 32 from Dallas County, 28 from Tarrant County and 27 from Bexar County. 42/ The Special Rapporteur is of the opinion that this statistical difference may be partly explained by the discretionary powers of the prosecutors.

80. Another important aspect of prosecutorial discretion is that the prosecutors have the ability to plea bargain. In many cases, the prosecutor will offer the option of not seeking the death penalty if the defendant agrees

to plead guilty to a lesser offence. In cases with several defendants, plea bargains will be offered in return for one of the defendants testifying against his/her co-defendant(s).

81. An additional aspect of the prosecutors' role is that they may seek the opinion of the family of the victim. The Special Rapporteur was informed by several District Attorney's Offices that the view of the family is taken into consideration as long as their request is compatible with the gravity of the offence. Non-governmental sources report that there may be excessive discretion in the selection of which families the office of the prosecutor will or will not approach. According to the information received, the selection of which families the prosecutor approaches has often been alleged to be influenced by race and class. The Special Rapporteur met with victims' families who had been approached by the local prosecutor, but once they informed the prosecutor that they did not wish the death penalty to be sought, the prosecutor stopped cooperating with them. The discretion in selecting which families the office of the prosecutor approaches may indeed increase the risk of arbitrariness in imposing a sentence of death. 43/

82. The Special Rapporteur explained to prosecutors with whom he met that allegations of racial discrimination in deciding when to seek the death penalty were being received at his office. He was informed by District Attorneys in some states that when the decision whether to seek the death penalty is made, no particular information concerning the race of the defendant or the victim is brought to the attention of the District Attorney. However, due to the fact that this information is contained in police files, it is difficult to imagine that this information is not available to the prosecutor.

83. Politics may also interfere in the discretionary power of the prosecutors. In March 1996, New York Governor George Pataki decided to supersede the authority of Bronx District Attorney Robert T. Johnson in the murder case of a police officer. Mr. Johnson had previously expressed his intention to exercise his discretion to pursue life without parole in every appropriate case. The Governor referred the case to the State Attorney-General, Dennis Vacco, who announced he would seek the death penalty. 44/ The Special Rapporteur was also informed that the Manhattan District Attorney, Mr. Robert M. Morgenthau, was under pressure from the Governor of the State of New York as well as the Mayor of New York City to seek the death penalty for a defendant accused of killing a police officer. 45/ Reportedly the New York Court of Appeals recently ruled that the State Attorney-General of New York may take over a death penalty case if a District Attorney decides as a matter of discretion not to pursue the death penalty. While the discretion of the prosecutor is virtually unreviewable, it is not insulated in practice from pressures which can affect the prosecutor's decisions in ways that may increase arbitrariness.

84. At the federal level, more processes have been put in place to restrict or guide the discretion of the federal prosecutors. For example, the death penalty may only be sought with the written authorization of the Attorney-General. Federal attorneys prepare Death Penalty Evaluations in which they identify aggravating and mitigating circumstances, indicating why

a capital sentence is recommended. A committee at the Department of Justice will further evaluate the case and forward its recommendation to the Attorney-General, who will make the final decision.

3. Jury selection process

85. In 28 states of the 38 with death penalty statutes, the sentencing decision is in the hands of the jury. In four states, Alabama, Delaware, Florida and Indiana, the jury makes a recommendation concerning sentencing which can be overridden by the judge. In other states, including Arizona, Colorado, Idaho, Montana and Nebraska, the decision is made by the judge.

86. In the United States a person charged with a capital offence has the right to be tried before a jury. A jury of 12 persons is selected from the community. Juries are selected from panels drawn randomly from local residents, generally through lists of persons with a driver's licence or registered to vote. Prospective jurors will be questioned to find out if they have any biases which will keep them from serving as a member of the jury charged to carry out the law impartially. During the jury selection process, both the prosecutor and the defence lawyer have a right to exclude certain people from the jury, either for a stated reason, or without giving a reason. Exclusion for no explained reason is known as peremptory challenge. The prosecutor and the defence lawyer have the power to use a limited number of peremptory challenges and an unlimited number of challenges for cause. In Batson v. Kentucky, the Supreme Court noted that peremptory challenges on invalid racial grounds are not acceptable. However, in practice it is impossible to acknowledge that the system does not tolerate the use of peremptory challenges along racial lines. As a result, it has not been uncommon that black defendants are tried before a totally or almost all-white jury.

87. In this regard, the Special Rapporteur has intervened, inter alia, on behalf of: (a) Johnny Watkins, black, who was sentenced to death by an all-white jury in Danville, Virginia, and executed on 3 March 1994. The prosecutor had allegedly eliminated all prospective black jurors from the jury through peremptory challenges; and (b) Hernando Williams, black, executed in Illinois in March 1995, after having been convicted and sentenced to death by an all-white jury in Cook County, Illinois, after the prosecutor had excluded all 26 black jurors from jury service. In both cases their victims were reportedly white.

88. During a jury selection for a capital trial, potential jurors will be asked if they are opposed to the death penalty. Those who are oppossed to the death penalty are likely to be taken off the panel of prospective jurors. Many members of minority groups are opposed to the death penalty because it has been disproportionately used against members of their respective communities. Even if a potential juror says that he is against the death penalty but that he may consider imposing it, his exclusion can be justified.

89. It is the Special Rapporteur's view that while the jury system was intended to represent the community as a whole, the community can hardly be represented when those who oppose the death penalty or have reservations about it seem to be systematically excluded from sitting as jurors.

90. Two phases can be differentiated in capital cases. In the initial phase, the jury determines whether the defendant is guilty or innocent. If he/she is found guilty, the second phase of the trial consists in determining the penalty. The possible choices may be death, life imprisonment and, in some states, life imprisonment without possibility of parole. Generally, in the second phase of the trial the jury has to find, in order to impose a death sentence, that there are statutory aggravating circumstances (most states have between 7 and 10 in their statutes). At least one aggravating circumstance has to be found in order to impose a death penalty. Consideration has to be given, however, to mitigating circumstances (whatever information the defendant offers in order to convince the jury to spare his life). The jury is instructed to balance aggravating and mitigating circumstances before coming to a verdict. If they find at least one aggravating circumstance that outweighs mitigating circumstances, the result can be a death sentence (see para. 119 below).

91. In this second phase of the trial, when the jury has to determine the penalty, the guidance that the jury receives may inappropriately influence the penalty. Thus, according to information received, the information the juries receive concerning the meaning of the sentencing options varies according to the state. For example, in Texas, the jury cannot be instructed on the meaning of "life imprisonment". This situation gives rise to strong concerns because in many cases jurors are said to believe that by choosing life imprisonment the defendant may shortly be released from prison. However, different surveys (see paras. 103-104) show that when a person is informed about the meaning of life imprisonment, if given the option of choosing between the death penalty or life imprisonment, they tend to choose the second option.

4. The right to counsel: impact of de-funding resource centres and the 1996 Anti-Terrorism and Effective Death Penalty Act

92. Federal and state criminal procedures ensure the right to counsel for trial and direct appeal in death penalty cases. There is no guarantee of counsel at post-conviction review. However, this constitutional right to counsel does not always ensure adequate or effective counsel. The importance of adequate legal representation, particularly in capital punishment cases, is essential because ineffective counsel may result in death.

93. When a person is arrested and charged with a capital offence, there are several options concerning counsel. If the defendant has enough financial resources he/she may get a private lawyer. If the defendant cannot afford a private lawyer, the state, in those states where there is an institutionalized public defender system, such as in Florida, or a capital defenders office, as in New York, will provide counsel for indigent defendants. If the state does not have a public defender system, such as Texas, and the defendant is indigent, the defendant has a right to a court-appointed lawyer.

94. The competence of the initial lawyer is fundamental, as many issues, including factual and legal issues which are not raised at the trial stage, are barred from being introduced in the appeal phase. Allegations concerning lack of adequate and effective counsel are of particular concern in those

states where the constitutional right to counsel is provided through a court-appointed lawyer. The particularities and the complexity of a capital case make standard professional qualifications inadequate to represent a defendant facing capital punishment. However, when a judge appoints a lawyer to represent a capital defendant, he/she does not necessarily consider the qualifications of the appointed lawyer. There are no specific criteria which a judge must use to appoint a lawyer. It depends entirely on the judge's decision. An additional difficulty is that court-appointed lawyers are reportedly not allocated sufficient resources to conduct investigations and develop evidence in favour of their clients. Negative racial attitudes of some court-appointed lawyers against their clients have also been documented. Furthermore, the lawyer is appointed by a judge who, in some states, is an elected official. Reportedly, judges are on many occassions elected for their strong position in favour of the death penalty. These factors may reportedly lead to the selection of pro-death penalty lawyers to defend capital cases.

95. Allegations of ineffective counsel in death penalty cases have been brought to the attention of the Special Rapporteur on several occasions. The Special Rapporteur intervened on behalf of Mumia Abu-Jamal, black, sentenced to death in Pennsylvania for the murder of a white police officer, after concerns about the competence of his trial counsel, the inadequate funding provided to the defence to investigate the case and doubts about the evidence collected against him were brought to his attention. He also intervened on behalf of Calvin Burdine, a homosexual, sentenced to death in Texas. According to the information received, his lawyer fell asleep on several occasions during the trial. The lawyer was said to have accepted three jurors onto the jury who were said to have prejudice against homosexuals. Further, the Special Rapporteur was informed that the lawyer failed to object to the statement made by the prosecutor during the sentencing phase of the trial, according to which being sent to the penitentiary was not a very bad punishment for a homosexual. 46/ The Texas Court of Criminal Appeals reportedly ruled that his lawyer's failure to stay awake did not affect the outcome of the case. However, the federal court gave Burdine a stay of execution and ruled that another hearing was necessary to establish if his trial had been prejudiced.

96. The importance of the initial defence counsel is also crucial because in some states it is very difficult to obtain relief on the basis of ineffective counsel. According to the information received, in several cases in Texas, despite strong evidence suggesting ineffective counsel, the Court of Criminal Appeals rejected findings and denied relief without a written opinion explaining why they rejected the findings. A similar disregard for appeals on claims of ineffective counsel is reported in the federal court system. In particular, two federal courts, the Fifth Circuit Court of Appeals, which covers Texas, Mississippi and Louisiana, and the Fourth Circuit Court of Appeals, which covers North Carolina, South Carolina, Virginia, West Virginia and Maryland, are reportedly very unlikely to grant relief on ineffective counsel claims.

97. Even though there is no constitutional right to counsel at a post-conviction level, many states and the Federal Government had previously funded post-conviction defender organizations (PCDOs), also known as resource

centres, which represented persons at this stage of the proceedings or provided help to lawyers representing them. They also helped by trying to locate counsel for death row prisoners.

98. The already difficult situation concerning adequate counsel has been worsened by the severe cuts in funding for PCDOs in 1995, and by the enactment of the 1996 Anti-Terrorism and Effective Death Penalty Act.

De-funding of PCDOs

99. Created in 1988, the PCDOs helped to raise the quality of representation at post-conviction and habeas corpus proceedings. In 1995, Congress stopped funding for PCDOs. The absence of PCDOs creates a grave difficulty for defendants at the post-conviction level, particularly in those states such as Texas which do not have a formally constituted agency or institution providing specialized court-appointed lawyers for capital defendants. While the judge is obliged to appoint a lawyer for trial and direct appeal, representation is not assured at the post-conviction level. The result is that many death row inmates do not have legal representation at post-conviction level. In some states, like California, the state has provided some money to continue supporting post-conviction representation. However, the Special Rapporteur was informed that 170 death row inmates in California currently have no legal counsel.

Enactment of the 1996 Anti-Terrorism and Effective Death Penalty Act

100. In April 1996, the President of the United States signed into law the Anti-Terrorism and Effective Death Penalty Act. The law was designed to shorten the time for the appeals process for convicts on death row. The law establishes limits on the number of habeas corpus appeals which may be made and sets time limits for federal courts to review decisions by state courts. This law will cause capital cases to proceed more quickly from state court to federal court and most substantive decisions will be made by state court judges. A further effect of this law is that the role of the federal judge in state capital punishment cases is substantially reduced. Under the new law, there is a narrower scope of review, so more aspects of the trial are unreviewable and justice depends more on the actions of the lower court judges. A movement to speed up executions in state law has also been reported. In some states, laws requiring capital defendants to raise all their claims at a single appeal have been enacted. The Special Rapporteur fears that this may lead to the legal impossibility of taking into account new evidence which becomes known at a later stage and to redress inadequacies caused by incompetent counsel.

101. In addition, in some states, such as Texas, where no public defender system exists, there is no institutional experience in defending death penalty cases. In addition, most of the judges are former prosecutors. Over the years, this creates a climate far more favourable to the prosecution than to the defence.

5. The right to seek pardon or commutation

102. Article 6 (4) of the ICCPR provides for the right to seek pardon or commutation of the sentence. The procedure for pardons or commutation differs from state to state. The Special Rapporteur was informed that in several states members of the board of pardons and paroles are appointed by the governor of the state. This may lead to politicization of the pardon or commutation. Pardon or commutation generally has limited fair-procedure safeguards and are unreviewable. The final decision is made in most cases by the governor and by the President in the federal system. In several states members of the parole boards meet and have granted or recommended pardon on several occasions. However, the Special Rapporteur was appalled to find out that in Texas, the members never meet, do not discuss the cases brought to their attention together and provide their individual votes by phone. Not surprisingly, the board has never recommended pardon in a capital case.

6. The role of public opinion

103. During his mission, the Special Rapporteur was repeatedly told that the death penalty is applied because that is what the people want. However, the Special Rapporteur emphasizes that a thorough analysis of the will of the people may change this assumption considerably. Recent studies in the United States show that people are not simply "in favour of" or "opposed to" the death penalty. According to criminologist Dennis Longmire, in his study on attitudes on capital punishment, positions on the death penalty are not so clear, and 73 per cent of the people have inconsistent attitudes towards this punishment. In his study, he concluded that "people tend to be quick to stand in support of this sanction, but they are just as quick to back off their support when given specific information about its administration". 47/ Further, as stated in the Secretary-General's fourth quinquennial report on capital punishment (E/1990/38/Rev.1 and Corr.1 and Add.1), there is a need to differentiate between sporadic popular support of capital punishment and well-informed opinion.

104. According to a 1997 poll conducted by Sam Houston State University, the number of Texans favouring the death penalty has slightly decreased. In 1977, 80 per cent of Texans reportedly supported capital punishment, while in 1997 the number dropped to 76 per cent. Despite this initial high figure, however, 48 per cent of the respondents to the survey who initially reported that they were uncertain about their position became opposed to the death penalty when offered the possibility of a life sentence option. Similar conclusions have been reached by other studies. Thus, William Bowers, in his New York study, found that 71 per cent of the respondents supported the death penalty. However, this figure was reduced to 19 per cent when the alternative of life imprisonment without parole was offered. 48/

C. Lack of awareness of United States international obligations

105. Government officials and members of the judiciary at the federal and state levels with whom the Special Rapporteur held meetings (with the exception of officials in the Department of State) had little awareness of the International Covenant on Civil and Political Rights and international legal

obligations of the United States regarding the death penalty. Few knew that the United States had ratified this treaty and that, therefore, the country was bound by its provisions. It was brought to the attention of the Special Rapporteur that state authorities had not been informed by the Federal Government about the existence and/or ratification of this treaty, and were consequently not aware of it. No efforts appeared to have been undertaken by the Federal Government to disseminate the ICCPR.

106. In several cases, relevant state judicial authorities told the Special Rapporteur that, should a claim be brought before them on the basis of a violation of the ICCPR, they would consider and analyse its implications. However, many others told him that the ICCPR was not a state law and therefore was not applicable.

107. In view of this disturbing finding, at the end of his mission to the United States, the Special Rapporteur sent a fax, dated 8 October 1997, to the Department of State, Human Rights Division, requesting information on the efforts undertaken to disseminate the provisions of the ICCPR following its ratification. At the time of finalization of this report, almost three months later, no answer to his communication had yet been received.

108. There seems to be a serious gap in the relations between federal and state governments, particularly when it comes to international obligations undertaken by the United States Government. The fact that the rights proclaimed in international treaties are already said to be a part of domestic legislation does not exempt the Federal Government from disseminating their provisions. Domestic laws appear de facto to prevail over international law, even if they could contradict the international obligations of the United States.

109. The Special Rapporteur has also found that there is a generalized perception that human rights are a prerogative of international affairs, and not a domestic issue. The fact that only the Department of State has a Human Rights Division, as well as the low level of awareness of international human rights standards within the Department of Justice, are clear indications of this phenomenon. While the Special Rapporteur recognizes the important role that the United States is playing in the establishment and monitoring of human rights standards in many countries of the world, he is compelled to note that human rights seem not to be taken seriously enough in the domestic arena.

110. The Special Rapporteur notes that both the Department of Justice and the Department of State are branches of the Federal Government and it is critical that they work together to ensure that obligations undertaken internationally by the United States are implemented domestically. Domestic implementation is the responsibility of all branches of the Government, executive, judicial and legislative. Within the executive branch, the Justice Department is one of the primary players in enforcing human rights domestically. Thus, it must work cooperatively to educate, disseminate and enforce the human rights obligations undertaken by the United States.

D. Other issues of concern

1. Participation of victims in the justice system

111. The term "victim of crime" is defined, in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly by its resolution 40/34 of 29 November 1985, as a person who has suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of his/her fundamental rights, through acts or omissions that are in violation of criminal laws (para. 1). According to this Declaration, victims (who are to be understood as including immediate family or dependants) of crimes are entitled to respect and compassion, as well as, inter alia, to access to mechanisms of justice, proper assistance throughout the legal process and prompt redress. Victims have no right to retaliation.

112. During his mission, the Special Rapporteur observed the existence of a very strong movement for victims' rights. 49/ According to the information received, 29 states have amended their constitutions to include specific rights for victims of crime. The Special Rapporteur is concerned by the fact that victims' rights as provided by law in some states may undermine the rights of the accused. Thus, in the Constitution of the State of Florida, section 16, it is stated that: "In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation". Further, it also states that, "Victims of crime ... are entitled to the right to be informed ...".

113. The impact of the victims' rights movement led the President, in his State of the Union Address on 4 February 1997, to announce his support for passage of a victims' rights amendment to the Constitution. According to the information received, a proposal to amend the United States Constitution to recognize victims' rights in the criminal justice system is to be considered by Congress. The rights proposed for victims include, among others, the right to notice of all public proceedings concerning the crime and the right not to be excluded from them, the right to a final disposition free from unreasonable delay, and the right to have the victims' safety considered with regard to the release from custody of the defendant.

114. Several aspects of this constitutional amendment, in particular the right to a final disposition free from unreasonable delay, appear to undermine the rights of the accused. This right seems to be intended to speed up prosecutions and limit appeals. There are fears that this right may interfere with the defendant's right to counsel. For example, if the defence would need more time to prepare the case, a victim could claim his constitutional right to have the process concluded, on the basis of which a request for continuance could be denied. Considering that habeas corpus proceedings may take place long after the trial, habeas proceedings already limited by the enactment of the Anti-Terrorism and Effective Death Penalty Act could be further undermined by the amendment as it could lead to shortening time periods.

2. The risk of executing the innocent

115. The Special Rapporteur holds the opinion that there is no such thing as an infallible legal system or one in which mistakes do not occur; to the contrary, mistakes do occur. However, acknowledging a mistake once a person has been executed is meaningless. The Special Rapporteur is concerned that in the United States innocent people may be sentenced to death and even executed. In Furman v. Georgia (1972), Justice Marshall referred to this problem stating that "No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real. We have no way of judging how many innocent persons have been executed, but we can be certain that there were some". A report issued on 21 October 1993 by the House Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary listed 48 persons who had been released from death row from 1973 to 1993 because evidence of their innocence had emerged.

116. The Special Rapporteur intervened on behalf of Ricardo Aldape Guerra, convicted and sentenced to death in 1982 for the killing of a police officer in Houston. A federal judge ruled in 1994 that he should be released or retried, as the police and prosecutors in the case had acted in bad faith. The ruling was upheld by the United States Court of Appeals. A new trial was granted, but the Houston District Attorney dropped the charges. Ricardo Aldape Guerra, who had always denied that he shot the officer, was released in 1997.

3. Executions of foreign nationals

117. The United States ratified the Vienna Convention on Consular Relations in November 1969. By ratifying the Convention, the United States is obliged to comply with the requirements of its provisions. Article 36 provides for foreign nationals arrested in another country to be informed without undue delay of their right to contact their consulate for assistance.

118. Information received suggests that many of the foreigners who are currently sentenced to death in the United States were never informed of their rights under the Vienna Convention on Consular Relations. It is alleged that some 60 foreigners were sentenced to death without having had the assistance of their consulate. Some of them, like Mexican Irineo Tristan Montoya, sentenced to death in Texas, were executed. On 9 July 1997, in an apology issued by the Department of State on his case, it was stated that, "The Department of State extends, on behalf of the United States, its most profound apology for the apparent failure of the competent authorities to inform Mr. Tristan Montoya that he could have a Mexican consular officer notified of his detention".

119. Although information received makes it clear that the State Department has, on several occasions, informed officials of various states, including governors and attorneys-general, of their duties under article 36, it appears that the periodic advisories given by the Department receive no consideration. It is of concern that reportedly no courts in any death penalty case have found that the preclusion of notification of the right to contact their consulate for assistance is sufficient to warrant relief. In the case of Joseph Standley Faulder, a Canadian national, the Fifth Circuit Court of

Appeals called Texas's violation of the Convention a harmless error. Patrick Jeffries, also a Canadian citizen, sentenced to death in 1983 in Washington State, was never informed about his right under the Vienna Convention to contact the Canadian consulate for assistance. Allegedly, because of the omission, he was not able to obtain adequate legal representation and mitigating factors were not introduced in the sentencing phase of his trial, therefore leaving the jury no alternative but to sentence him to death.

120. Further, the lack of awareness on the part of judicial authorities about the Vienna Convention makes it difficult for lawyers to raise violations of this treaty. During the trial of Virginio Maldonado, a 31-year-old Mexican national, the defence lawyer claimed a violation of the rights of his client under this treaty. According to the information received, the trial judge stated, referring to the Vienna Convention on Consular Relations: "I don't know that it exists ... I am not an international law expert". Further, the prosecutor in the case argued the law was irrelevant because it was not a Texas law. 50/.

121. The Special Rapporteur is of the view that not informing the defendant of the right to contact his/her consulate for assistance may curtail the right to an adequate defence, as provided for by the ICCPR.

IV. DEATH AS A RESULT OF EXCESSIVE USE OF FORCE BY LAW ENFORCEMENT OFFICIALS

122. During his visit to the United States, the Special Rapporteur devoted a small proportion of his time to collecting information about other types of violations of the right to life, particularly those caused by excessive use of force.

123. According to the information received, deadly force nationwide is more likely to be disproportionately used on racial minorities. Cases of persons killed by police brought to the attention of the Special Rapporteur all concerned members of ethnic minorities, mainly African-Americans and Hispanics. Young African-Americans are said to be looked upon as potential criminal suspects. The Special Rapporteur was informed that according to a recent study conducted in the Washington, D.C. area on who is stopped for traffic violations, only 14 per cent of drivers were white while 73 per cent were African-American. According to the information received, of the complaints filed with the New York City Civilian Complaint Review Board (CCRB) from January to June 1996, 75 per cent were filed by African-Americans or Hispanics. In 65 per cent of the cases, the police officers involved were white.

124. Many police departments are trying to have a more balanced ethnic representation among their personnel in an effort to make them more representative of the local population. The Special Rapporteur was informed that in Miami, 50 per cent of the police officers are Hispanic, 25 per cent are African-American and 25 per cent white. In New York, 72.2 per cent of the officers are white, 15.2 per cent are Hispanic and 11.5 per cent are

African-American. 51/ Balancing the composition of police departments according to the ethnic distribution of the local population may also have a positive impact in reducing allegations of racial bias.

125. During public hearings he held in New York, the Special Rapporteur was informed, inter alia, that the following persons had been killed by police officers: 52/

(a) José Antonio Sánchez, Dominican, killed on 22 February 1997 by a police officer during a raid on the El Caribe restaurant in Queens where he worked as a cook. Police claimed Sánchez attacked them with a knife;

(b) Frankie Arzuega, aged 15, Puerto Rican, killed on 12 January 1996 after being shot in the back of the head as he sat in the back seat of a car stopped by police officers of the 90th Precinct in Brooklyn. Police claimed the driver of the car tried to drive off while being questioned by one of the police officers. No weapons were found. Officers did not report the case for three days, and were not disciplined;

(c) Yong Xin Huang, aged 16, Chinese, shot on 24 March 1995 by a Brooklyn police officer investigating reports of a child with a gun. He was shot at close range behind the ear. He was playing with a pellet gun;

(d) Anibal Carrasquillo, aged 21, Puerto Rican, shot dead by a police officer in Brooklyn on 22 January 1995. Police reportedly claimed he was acting in a suspicious manner. No weapon was found and an autopsy revealed that he was shot in the back;

(e) Aswon Watson, aged 23, African-American, killed on 13 June 1996 in Brooklyn. Reportedly shot 18 times by officers of the 67th Precinct while sitting in a stolen car. No arms were found. A grand jury chose not to indict the officers;

(f) Anthony Rosario, aged 18, and Hilton Vega, aged 21, both Puerto Rican, shot on 22 January 1995 by police from the 46th Precinct in the Bronx while trying to rob an apartment. Rosario was shot 14 times in the back and side. In March 1995 a grand jury voted not to bring criminal charges against the police officers. The CCRB supported the family claims, agreeing that excessive force was used and recommended that formal charges be brought against the officers. The CCRB sent its report to the Police Commissioner, who was said to have criticized the Board.

126. In addition, Anthony Baez, aged 29, Puerto Rican, was killed on 22 December 1994 by a police officer of the 46th Precinct in the Bronx who applied a chokehold on him. The officer who killed him had previously had 14 complaints of brutality lodged against him. According to the information received, the use of chokeholds was banned in 1993 by the New York Police Department (NYPD). Other police departments, such as those in San Francisco and Los Angeles, are said to continue using it if necessary to protect the lives of officers.

127. The Special Rapporteur was also informed about deaths committed as a result of the use of pepper spray. Pepper spray is a weapon that attacks

the respiratory system. While it is meritorious that police look for strategies and weapons that do not cause injuries, pepper spray has raised concerns because several persons are said to have died due to its use. At least two individuals died in San Francisco after pepper spray was used. Aaron William, an African-American, reportedly died in police custody after being beaten and pepper-sprayed by police officers. The Special Rapporteur was particularly shocked at the death of Sammy Marshall in San Quentin prison in California. Marshall, a 51-year-old man, was on death row for murder. On 27 February 1997, the California Supreme Court reversed his death sentence. According to the information received, he was never informed about it. On 15 June, several guards allegedly entered his cell and asked him to come out. When he refused, pepper spray was used, which reportedly caused his death.

128. The Special Rapporteur was informed about the existence of a special unit in the Los Angeles Police Department, known as the Special Investigation Section (SIS), created in 1965 and composed of a group of about 20 officers who are known to conduct controversial operations which have on many occasions resulted in deaths. According to the information received, on 12 February 1990 a McDonald's restaurant in the Sunland area of Los Angeles was robbed by four individuals while SIS members monitored the incident without intervening. Allegedly, once the four individuals had left the SIS agents opened fire as they were trying to leave in a car. Three of the robbers were killed and one was seriously injured. None of them was said to have fired any shots at the officers.

129. The existence of an independent civilian review system through which persons may file complaints of police misconduct offers the possibility of more impartiality. In New York, the CCRB was established in 1993. It is composed of 13 members appointed by the mayor, five of whom are chosen by the mayor, five by the City Council and three by the Police Commissioner. The Board is an independent, non-police agency with the power to investigate allegations of misconduct filed by citizens against NYPD officers. It has the power to receive, investigate, hear, make findings and recommend action on complaints concerning New York City police officers involving excessive or unnecessary use of force, abuse of authority and discourtesy or offensive language. Once a case has been investigated, the Board may recommend any of the following dispositions with regard to the complaint: substantiated (the officer actually committed the alleged act), unsubstantiated (not enough evidence), exonerated (the incident occurred but the actions of the officer were lawful), or unfounded (acts did not occur). In cases of killings, the CCRB can carry out an investigation even if Internal Affairs is also doing it. The CCRB reports its findings to the Police Commissioner, but it has no authority to guarantee that disciplinary action will be taken. This will be decided by the police department while the officer under investigation may continue to work.

130. All sources consulted have agreed that police departments in the United States have high written standards in regard to training and guidelines on the use of force. Principles reflected in the Code of Conduct for Law Enforcement Officials (General Assembly resolution 34/169 of 17 December 1979), as well as the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990,

are reportedly fully reflected in police regulations. This is despite the fact that there is little, if any, awareness of the existence of these international standards. The Special Rapporteur is of the opinion that there is a need for federal authorities to take concrete measures to ensure that all levels of armed officials are trained and meet those standards.

131. It was difficult for the Special Rapporteur to obtain information concerning killings committed by the police in the United States. National data seemed not to be available. The Special Rapporteur was informed that there have been some attempts to collect national figures on police violence. The introduction in Congress of a bill called the Police Stop Statistics Act, which would require each individual police department to collect data on police stops, including whether a search was conducted or if violence was used, is an example.

132. The Special Rapporteur is aware of the dangerous situations that police officers face, and that the majority of confrontations which require use of force do not result in death, testimony to the degree of professionalism which exists in United States police departments. However, in many of the cases brought to his attention, the use of lethal force was said not to have been justified.

133. The low rate of criminal prosecution in cases of police brutality remains the principal cause for the perpetuation of violations of human rights by the police, in particular violations of the right to life. The manner in which a Government reacts to human rights violations committed by its agents, through action or omission, clearly shows the degree of its willingness to ensure effective protection of human rights. States have the obligation to conduct exhaustive and impartial investigations into allegations of violations of the right to life, to identify, bring to justice and punish the perpetrators, to grant adequate compensation to the victims or their families, and to take effective measures to avoid the recurrence of such violations. 53/

134. The fact that few police officers are subject to criminal prosecution for abuse of force resulting in death has been attributed to several factors, as described below:

135. Lack of proper investigations. On many occasions police misconduct - including killings caused by police - is investigated by an Internal Affairs Department (internal system for dealing with complaints and allegations of misconduct) within the police. According to the information received, they do not have independent subpoena power to call witnesses and compel their participation in proceedings. The District Attorney's Office generally receives notice of every shooting, but it does not necessarily get involved. The fact that it is the police department that investigates a shooting in which police officers were involved creates a conflict of interest. In most cases, police officers are not permanently assigned to the Internal Affairs Department; they work there for some years and then go back to the regular police force. It would be unrealistic to expect impartiality from those who conduct investigations against colleagues, particularly when their positions may later be reversed. Unless there is an independent oversight, these cases will not be properly investigated. This is why it is very important to have an independent body to investigate complaints against the police.

136. Compensation for damages does not generally come from the Police Department. The fact that money paid for damages normally does not come from police departments but from the municipality does not act as an incentive for the police department and allows the situation to be perpetuated. The Special Rapporteur was informed that in some police departments, such as in San Francisco, the situation has changed and that money comes from the police department itself. Consultations in this direction are also said to be under way in New York city.

137. Political influence of police in the country. Police unions in the United States are reported to be an important political entity. Not only do they represent their members, but they also make political endorsements. Politicians, when running for election, including for president, are particularly interested in receiving support from police unions because they are perceived as being "tough" on crime. In the context of misconduct, police are likely to benefit from political protection. At the federal level, there has reportedly been a lack of interest in investigating police misconduct. Criminal prosecution is rare for similar political reasons: local district attorneys who run for office need support from police unions. In addition, the district attorney depends on the police department to conduct investigations. Unlike in many countries, the police in the United States are structurally independent of the judge as well as of the prosecutor's office. Therefore, prosecutors must always be aware, even as they seek to prosecute abusive police, that they will require the cooperation of these same police in all future criminal investigations and prosecutions. Therefore, it is allegedly difficult for a district attorney to decide to bring charges against a police officer. The district attorney must decide whether there is sufficient evidence to bring the case before a grand jury, which makes the decision whether or not the evidence justifies bringing an indictment.

138. It has also been brought to the attention of the Special Rapporteur that the standards of criminal liability for police are very high. Hence, not only does it have to be proven whether the officer used unreasonable force, but also whether he intended to use it. In many cases, the intention to use excessive force is difficult to prove.

139. The Special Rapporteur has further been informed that the Justice Department has the power to investigate entire police departments for patterns and practices of misconduct and can require certain practices to be changed. In New York City, the Justice Department intervened only after the Abner Louima case. 54/

V. CONCLUSIONS AND RECOMMENDATIONS

> "Where, after all, do universal rights begin? In small places, close to home - so close and so small that they cannot be seen on any maps of the world ... . Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world." - Eleanor Roosevelt

A. Concerning the use of the death penalty

140. The Special Rapporteur shares the view of the Human Rights Committee and considers that the extent of the reservations, declarations and understandings entered by the United States at the time of ratification of the ICCPR are intended to ensure that the United States has only accepted what is already the law of the United States. He is of the opinion that the reservation entered by the United States on the death penalty provision is incompatible with the object and purpose of the treaty and should therefore be considered void.

141. Not only do the reservations entered by the United States seriously reduce the impact of the ICCPR, but its effectiveness nationwide is further undermined by the absence of active enforcement mechanisms to ensure its implementation at state level.

142. The Special Rapporteur is of the view that a serious gap exists between federal and state governments, concerning implementation of international obligations undertaken by the United States Government. He notes with concern that the ICCPR appears not to have been disseminated to state authorities and that knowledge of the country's international obligations is almost non-existent at state level. Further, he is of the opinion that the Federal Government cannot claim to represent the states at the international level and at the same time fail to take steps to implement international obligations accepted on their behalf.

143. The Special Rapporteur is aware of the implications of the United States system of federalism as set out in the Constitution and the impact that it has on the laws and practices of the United States. At the same time, it is clear that the Federal Government in undertaking international obligations also undertakes to use all of its constitutionally mandated powers to ensure that the human rights obligations are fulfilled at all levels.

144. The Special Rapporteur questions the overall commitment of the Federal Government to enforce international obligations at home if it claimed not to be in a position to ensure the access of United Nations experts such as special rapporteurs to authorities at state level. He is concerned that his visit revealed little evidence of such a commitment at the highest levels of the Federal Government.

145. The Special Rapporteur believes that the current practice of imposing death sentences and executions of juveniles in the United States violates international law. He further believes that the reintroduction of the death penalty and the extension of its scope, both at federal and at state level, contravene the spirit and purpose of article 6 of the ICCPR, as well as the international trend towards the progressive restriction of the number of offences for which the death penalty may be imposed. He is further concerned about the execution of mentally retarded and insane persons which he considers to be in contravention of relevant international standards.

146. The Special Rapporteur deplores these practices and considers that they constitute a step backwards in the promotion and protection of the right to life.

147. Because of the definitive nature of a death sentence, a process leading to its imposition must comply fully with the highest safeguards and fair trial standards, and must be in accordance with restrictions imposed by international law. The Special Rapporteur notes with concern that in the United States, guarantees and safeguards, as well as specific restrictions on capital punishment, are not being fully respected. Lack of adequate counsel and legal representation for many capital defendants is disturbing. The enactment of the 1996 Anti-terrorism and Effective Death Penalty Act and the lack of funding of PCDOs have further jeopardized the implementation of the right to a fair trial as provided for in the ICCPR and other international instruments.

148. Despite the excellent reputation of the United States judiciary, the Special Rapporteur observes that the imposition of death sentences in the United States seems to continue to be marked by arbitrariness. Race, ethnic origin and economic status appear to be key determinants of who will, and who will not, receive a sentence of death. As Justice Marshall stated in Godfrey v. Georgia, "The task of eliminating arbitrariness in the infliction of capital punishment is proving to be one which our criminal justice system - and perhaps any criminal justice system - is unable to perform".

149. The politics behind the death penalty, particularly during election campaigns, raises doubts as to the objectivity of its imposition. The Special Rapporteur believes that the system of election of judges to relatively short terms of office, and the practice of requesting financial contributions particularly from members of the bar and the public, may risk interfering with the independence and impartiality of the judiciary. Further, the discretionary power of the prosecutor as to whether or not to seek the death penalty raises serious concern regarding the fairness of its administration.

150. The process of jury selection may also be tainted by racial factors and unfairness. The Special Rapporteur notes with concern that people who are opposed to or have hesitations about the death penalty are unlikely to sit as jurors and believes that a "death qualified" jury will be predisposed to apply the harshest sentence. He fears that the right to a fair trial before an impartial tribunal may be jeopardized by such juries. Moreover, he is convinced that a "death qualified" jury does not represent the community conscience as a whole, but only the conscience of that part of the community which favours capital punishment.

151. The high level of support for the death penalty, even if studies have shown that it is not as deep as is claimed, cannot justify the lack of respect for the restrictions and safeguards surrounding its use. In many countries, mob killings and lynchings enjoy public support as a way to deal with violent crime and are often portrayed as "popular justice". Yet they are not acceptable in any civilized society.

152. While acknowledging the difficulties that authorities face in fighting violent crime, he believes that solutions other than the increasing use of the death penalty need to be sought. Moreover, the inherent cruelty of executions might only lead to the perpetuation of a culture of violence.

153. The Special Rapporteur is particularly concerned by the current approach to victims' rights. He considers that while victims are entitled to respect and compassion, access to justice and prompt redress, these rights should not be implemented at the expenses of those of the accused. Courts should not become a forum for retaliation. The duty of the State to provide justice should not be privatized and brought back to victims, as it was before the emergence of modern States.

154. While the Special Rapporteur would hope that the United States would join the movement of the international community towards progressively restricting the use of the death penalty as a way to strengthen the protection of the right to life, he is concerned that, to the contrary, the United States is carrying out an increasing number of executions, including of juveniles and mentally retarded persons. He also fears that executions of women will resume if this trend is not reversed.

155. The Special Rapporteur wishes to emphasize that the use of the death penalty in violation of international standards will not help to resolve social problems and build a more harmonious society but, on the contrary, will contribute to exacerbated tensions between races and classes, particularly at a moment when the United States is proclaiming its intention to combat racism more vigorously.

156. In view of the above, the Special Rapporteur recommends the following to the Government of the United States:

(a) To establish a moratorium on executions in accordance with the recommendations made by the American Bar Association and resolution 1997/12 of the Commission on Human Rights;

(b) To discontinue the practice of imposing death sentences on juvenile offenders and mentally retarded persons and to amend national legislation in this respect to bring it into conformity with international standards;

(c) Not to resume executions of women and respect the de facto moratorium in existence since 1984;

(d) To review legislation, both at federal and state levels, so as to restrict the number of offences punishable by death. In particular, the growing tendency to reinstate death penalty statutes and the increase in the number of aggravating circumstances both at state and federal levels should be addressed in order not to contravene the spirit and purpose of article 6 of the ICCPR and the goal expressed by the international community to progressively restrict the number of offences for which the death penalty is applied;

(e) To encourage the development of public defender systems so as to ensure the right to adequate legal representation for indigent defendants; to reinstate funding for legal resource centres in order to guarantee a more appropriate representation of death row inmates, particularly in those states where a public defender system does not exist. This would also help to diminish the risk of executing innocent persons;

(f) To take steps to disseminate and educate government officials at all levels as well as to develop monitoring and appropriate enforcement mechanisms to achieve full implementation of the provisions of the ICCPR, as well as other international treaties, at state level;

(g) To include a human rights component in training programmes for members of the judiciary. A campaign on the role of juries could further aim at informing the public about the responsibilities of jurors;

(h) To review the system of election of members of the judiciary at state level, in order to ensure a degree of independence and impartiality similar to that of the federal system. It is recommended that in order to provide a greater degree of independence and impartiality that judges be elected for longer terms, for instance 10 years or for life;

(i) In view of the above, to consider inviting the Special Rapporteur on the independence of judges and lawyers to undertake a visit to the United States;

(j) To develop an intensive programme aimed at informing state authorities about international obligations undertaken by the United States and at bringing national laws into conformity with these standards; to increase the cooperation between the Department of Justice and the Department of State to disseminate and enforce the human rights undertakings of the United States;

(k) To lift the reservations, particularly on article 6, and the declarations and understandings entered to the ICCPR. The Special Rapporteur also recommends that the United States ratify the Convention on the Rights of the Child. He further recommends that the United States consider ratifying the first and second Optional Protocols to the ICCPR.

B. Concerning killings by the police

157. The Special Rapporteur is concerned by the reports of violations of the right to life as a result of excessive use of force by law enforcement officials which he received during his mission, and he will continue to monitor the situation closely.

158. While acknowledging that the police face extremely difficult situations in their daily work, authorities have an obligation to ensure that the police respect the right to life.

159. Preliminary recommendations to the Government of the United States include the following:

(a) All alleged violations of the right to life should be investigated, police officials responsible brought to justice and compensation provided to the victims. Further, measures should be taken to prevent recurrence of these violations;

(b) Patterns of use of lethal force should be systematically investigated by the Justice Department;

(c) Training on international standards on law enforcement and human rights should be included in police academies. This is particularly relevant because the United States has taken a leading role in training police forces in other countries;

(d) Independent organs, outside the police departments, should be put in place to investigate all allegations of violations of the right to life promptly and impartially, in accordance with principle 9 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions;

(e) In order to avoid conflict of interest with the local district attorney's office, special prosecutors should be appointed more frequently in order to conduct investigations into allegations of violations of the right to life, to identify perpetrators and bring them to justice.

Notes

1/ Resolutions 1997/61, 1996/74, 1995/73, 1994/82 and 1993/71 entitled "Extrajudicial, summary or arbitrary executions".

2/ Security Council, in establishing international criminal jurisdictions for the former Yugoslavia and Rwanda, excluded the death penalty, stipulating that imprisonment was the sole penalty to be imposed by the tribunals for crimes as abominable as genocide and crimes against humanity.

3/ In its general comment on article 6 of the ICCPR, the Human Rights Committee observed that "the article also refers generally to abolition in terms which strongly suggest (paras. 2 (2) and (6)) that abolition is desirable". The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life. See HRI/GEN/1/Rev.3, part I.

4/ Resolutions 1396 (XIV), 2393 (XXIII) and 2857 (XXVI), and resolution 32/61 of 8 December 1977 entitled "Capital punishment".

5/ ECOSOC resolutions 1996/15, 1989/64, 1984/50, 1930 (LVIII), 1745 (LIV) and 1574 (L) "Capital punishment".

6/ The first Optional Protocol to the ICCPR allows individuals to submit communications to the United Nations Human Rights Committee, a body of experts established to supervise the implementation of the Covenant (article 28). Under article 40 of the Covenant, States parties must submit reports every five years on the measures they have taken which give effect to the rights recognized in the Covenant and on the progress made in the enjoyment of these rights. The reports presented are examined by the Human Rights Committee, which adopts concluding observations summarizing its concerns and makes recommendations to the State party concerned.

7/ See William A. Schabas, The Abolition of the Death Penalty in International Law (2nd ed.), Cambridge and New York, Cambridge University Press, 1997.

8/ See Decision of the Human Rights Committee, CCPR/C/39/D/305/1988 of 15 August 1990.

9/ Preliminary observations of the Human Rights Committee on the third periodic report of Peru (CCPR/C/79/Add.67, para. 15).

10/ Human Rights Committee, general comment No. 6, op. cit., at note 3, para. 7.

11/ Universal Declaration of Human Rights; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; Safeguards guaranteeing protection of the rights of those facing the death penalty; and ECOSOC resolution 1989/64 on implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty.

12/ Human Rights Committee, general comment 13, op. cit. at note 3, para. 5.

13/ CCPR/C/47/D/282/1988, para. 10.6.

14/ For the texts of the reservations, declarations and understandings, see CCPR/C/2/Rev.4.

15/ See CCPR/C/79/Add.50, para. 14.

16/ See also International Commission of Jurists, Administration of the Death Penalty in the United States, June 1996, p. 36, citing the report from the Committee on Foreign Relations to the Senate on the International Covenant on Civil and Political Rights, EXEC, Rep. V. 102-23 at page 11: "... Given the sharply differing view taken by many of our future treaty partners on the issue of the death penalty (including what constitutes 'serious crimes' under article 6 (2)), it is advisable to state our position clearly."

17/ Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Portugal, Spain and Sweden.

18/ Human Rights Committee, general comment 24, op. cit., at note 3, para. 1.

19/ Ibid., para. 6.

20/ Ibid., para. 18.

21/ Ibid, para. 10.

22/ General Assembly resolution 2856 (XXVI) of 20 December 1971.

23/ Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming, the United States Government and the United States Military.

24/ Alaska, Washington, D.C., Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia and Wisconsin.

25/ As of 31 July 1997. Statistics come from the National Association for the Advancement of Colored People (NAACP) Legal Defense and Educational Fund, Inc.

26/ Ibid.

27/ Ibid.

28/ Victor L. Streib, Capital Punishment of Female Offenders: Present Female Death Row Inmates and Death Sentences and Executions of Female Offenders, Ohio Northern University, July 1997.

29/ Human Rights Watch, Children's Rights Project, March 1995 and Amnesty International, USA: Death Penalty Developments in 1996.

30/ In the same recommendation, the ABA stated that "apart from existing Association policies relating to offenders who are mentally retarded or under the age of 18 at the time of the commission of the offenses, the Association takes no position on the death penalty".

31/ From the 1994 Survey of State Legislation compiled by the National Coalition to Abolish the Death Penalty, as cited by Amnesty International, USA: Death Penalty Developments in 1994.

32/ Ibid.

33/ Denis Keyes, William Edwards and Robert Perske, "People with mental retardation are dying, legally." See also Amnesty International, op. cit., which states, "Amnesty International has documented the cases of over 50 prisoners suffering from severe mental impairment who have been executed in the USA since 1982".

34/ Arkansas, Colorado, Georgia, Indiana, Kansas, Kentucky, Maryland, New Mexico, New York, Tennessee and Washington.

35/ Mental retardation "refers to substantial limitations in present functioning. It is characterized by significantly sub-average intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skills areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work. Mental retardation manifests before

47/ Dennis Longmire, "Americans' attitudes about the ultimate weapon", in Flanagan and Longmire (eds.), Americans View Crime and Justice. A National Public Opinion Survey, Sage Publications, 1996, chap. 7.

48/ W. Bower "Popular support for the death penalty: mistaken beliefs", in The Machinery of Death, Amnesty International USA, 1995.

49/ The Special Rapporteur was informed that the Prison Guards Union, which is one of the most powerful unions in the country, funds victims' rights movements.

50/ Houston Chronicle, 2 October 1997.

51/ Amnesty International, Police Brutality and Excessive Force in the New York City Police Department, June 1996, AI Index: AMR51/36/96, note 2, p. 3.

52/ Many other cases were brought to the attention of the Special Rapporteur during his mission, including in Santa Rosa, Chicago, Seattle, Los Angeles, San Francisco, and in New Jersey. In addition, cases of brutality, violence and bad prison conditions in Mississippi, particularly in Parchman Prison; Hernando City Jail; Quick Bed Facility 2-D in Pearl, Rankin County; and Delta Correctional Facility, Bolivar County, which the Special Rapporteur received during his mission will be transmitted to the Special Rapporteur on the question of torture.

53/ See the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Economic and Social Council resolution 1989/65), which set forth in detail the above-mentioned obligations, and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

54/ Abner Louima, a 30-year-old Haitian immigrant, was arrested on 9 August 1997 outside a popular Haitian night club in Brooklyn. He has filed suits alleging that he was beaten and tortured by police officers.

age 18". Randall Coyne and Lyn Entzeroth, "Report regarding implementation of the ABA's recommendations and resolutions concerning the death penalty, Georgetown Journal on Fighting Poverty, note 366.

36/ Bryan A. and Ruth Stevenson, "Deliberate indifference: judicial tolerance of racial bias in criminal justice, Washington and Lee Law Review, vol. 51, p. 509.

37/ Staff report on racial disparities in federal death penalty prosecutions 1988-1994 by the Subcommittee on Civil and Constitutional Rights, United States General Accounting Office, to the Senate and House Committees on the Judiciary, February 1990.

38/ Connecticut, Delaware, New Hampshire, New Jersey, South Carolina and Virginia.

39/ From "Politics and the death penalty: can rational discourse and due process survive the perceived political pressure?", Fordham Urban Law Journal, vol. XX, No. 2, 1994.

40/ Death Penalty Information Center, "Killing for Votes: The Dangers of Politicizing the Death Penalty Process", October 1996, citing S. Bright, "Judges and the politics of death: deciding between the Bill of Rights and the next election in capital cases", Boston University Law Review, vol. 75.

41/ Ibid.

42/ Texas Coalition to Abolish the Death Penalty, June 1997.

43/ See also, International Commission of Jurists, op. cit. at note 16, p. 124. "The danger cited here is that the practice potentially creates two classes of offenders: those who kill what are perceived as the most worthy members of society, and those whose victims are judged to have less societal value."

44/ On 19 March 1996, the Governor of New York sent a letter to Mr. Johnson, in which the Governor declared that "... the death penalty is the law in New York State ...". By letter dated 20 March, Mr. Johnson replied to the Governor, stating that "As to your statement, let's be clear that the death penalty is no more the law of New York than is the penalty of life imprisonment without parole. The Statute in no way suggests that a sentence of death is the 'better' or 'presumptive' choice (...). You know that the United States Supreme Court has declared that the death penalty cannot and should not be mandatory". The decision of the Governor has been challenged in court by the District Attorney.

45/ New York Times, 7 October 1997.

46/ Amnesty International, Urgent Action (UA) 13/95. AI Index: AMR 51/10/95.

Annex*

AS APPROVED BY THE ABA HOUSE OF DELEGATES
3 February 1997

AMERICAN BAR ASSOCIATION
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
SECTION OF LITIGATION
SECTION OF TORT AND INSURANCE PRACTICE
COMMISSION ON MENTAL AND PHYSICAL DISABILITY LAW
MASSACHUSETTS BAR ASSOCIATION
THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
NEW YORK STATE BAR ASSOCIATION

RECOMMENDATION

RESOLVED, That the American Bar Association calls upon each jurisdiction that imposes capital punishment not to carry out the death penalty until the jurisdiction implements policies and procedures that are consistent with the following longstanding American Bar Association policies intended to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed:

(i) Implementing ABA "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases" (adopted February 1989) and Association policies intended to encourage competency of counsel in capital cases (adopted February 1979, February 1988, February 1990, August 1996);

(ii) Preserving, enhancing and streamlining state and federal courts' authority and responsibility to exercise independent judgment on the merits of constitutional claims in state post-conviction and federal habeas corpus proceedings (adopted August 1982, February 1990);

(iii) Striving to eliminate discrimination in capital sentencing on the basis of the race of either the victim or the defendant (adopted August 1988, August 1991); and

(iv) Preventing execution of mentally retarded persons (adopted February 1989) and persons who were under the age of 18 at the time of their offences (adopted August 1983).

FURTHER RESOLVED, That in adopting this recommendation, apart from existing association policies relating to offenders who are mentally retarded or under the age of 18 at the time of the commission of the offenses, the Association takes no position on the death penalty.

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* Reproduced in the language of submission only.

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Fifty-fourth session
Item 10 of the provisional agenda

QUESTION OF THE VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN ANY PART OF THE WORLD, WITH PARTICULAR REFERENCE TO COLONIAL AND OTHER DEPENDENT COUNTRIES AND TERRITORIES

Extrajudicial, summary or arbitrary executions

Report of the Special Rapporteur, Mr. Bacre Waly Ndiaye submitted pursuant to Commission on Human Rights resolution 1997/61

Addendum

Visit to Sri Lanka

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Introduction

1. At the invitation of the Government of Sri Lanka, the Special Rapporteur on extrajudicial, summary or arbitrary executions visited Sri Lanka from 24 August to 5 September 1997. Prior to the visit, he had been in contact with the Permanent Representative of Sri Lanka to the United Nations Office at Geneva, who cooperated fully and facilitated the visit. During his stay in the country, all of the Special Rapporteurs' specific requests for meetings with high-level government officials were met, except for the meeting with the President and the Deputy Minister for Defence. Similarly, visits to Jaffna, Batticaloa and Ratnapura were facilitated with appropriate briefings and meetings. While in Sri Lanka, the Special Rapporteur enjoyed freedom of movement, and freedom of access to private individuals and non-governmental organizations.

2. The purpose of the visit was to assess the situation of the right to life in the country, to investigate allegations of extrajudicial executions and to check the implementation of certain measures introduced by the Government to safeguard the right to life, as well as its efforts to investigate, prosecute and prevent such occurrences.

3. The Special Rapporteur would like to record his deep appreciation to the Government of Sri Lanka for its cooperation in facilitating his visit to the country and in responding to his requests for information and explanation. The Special Rapporteur would also like to thank the United Nations Development Programme Resident Representative and the UNDP offices in Colombo and Jaffna for the logistical and organizational support provided in connection with the mission.

4. In Colombo, the Special Rapporteur met with the following governmental representatives: the Minister for Foreign Affairs; the Minister of Justice, Constitutional Affairs, Ethnic Affairs and National Integration; the Secretary, Ministry of Defence; the Secretary, Ministry of Justice; the Secretary and Additional Secretary and other officials from the Ministry for Foreign Affairs; the Attorney-General. He also met with the Inspector General of Police (IGP). In Jaffna and Batticaloa, the Special Rapporteur met with the Magistrate and the Regional Commanders of the armed forces and the police.

5. The Special Rapporteur also met members of Parliament representing various regions and parties, members of the newly established Human Rights Commission, members of the Commission of Inquiry into Involuntary Removal and Disappearances, lawyers, representatives of local human rights and other non-governmental organizations and dozens of victims of human rights violations and their relatives.

6. The information and views obtained in the course of his visits and meetings will be reflected below under relevant subject headings.

I. VISIT TO SRI LANKA

A. The general context

7. The population of the country is approximately 17.2 million, mainly concentrated in the south-western wet zone. The population of the Northern and Eastern provinces accounts for about 14 per cent of the total population, with the Jaffna peninsula being the only really densely populated area. The population is growing at approximately 1.2 per cent per annum.

8. Sri Lanka is a patchwork of ethnic groups and religions. The population can be divided into the majority Sinhalese (74 per cent), the Tamils (18 per cent), the Muslims (7 per cent) and Burghers, the descendants of colonialists (1 per cent). Similarly, while the majority (69 per cent) are Buddhist, 16 per cent are Hindu, 7 per cent are Muslim and 8 per cent are Christian. Three languages are spoken: Sinhala, Tamil and English; almost all Sinhalese are Buddhist and speak Sinhala. Tamils are mostly Hindu and speak Tamil; they are comprised of "Ceylon" or "Jaffna" Tamils (69 per cent), with a long history on the Island, and "Indian" or "estate" or "plantation" Tamils, descendants of labourers brought from southern India under British rule to work on coffee, tea and rubber plantations. The Muslims speak mostly Tamil but are distinguished by their religion.

9. In most of the country the Sinhalese form the majority. In the northern districts (including the Jaffna peninsula), the Ceylon Tamils are the largest community. The Indian Tamils reside mainly in the hill country in the central part of Sri Lanka. In the east, while Tamils and Muslims used to inhabit the area until the twentieth century, it is said that today all three communities are equally represented in terms of numbers. There are substantial Tamil and Muslim communities in the rest of the country, although they are in the minority there.

10. Sri Lanka was colonized successively by the Portuguese, the Dutch and the British, although it was the British who finally brought the whole country under a centralized system of government. However, each colonial power left its imprint upon Sri Lankan society in a variety of ways, including differential access to education and economic opportunity, often according to religion, linguistic and/or ethnic origin.

11. Before independence, under two centuries of British colonial rule English was the language of commerce and administration. The majority of Sri Lankans were therefore excluded from the process of government, but because English served as a bridge language between ethnic groups, minorities, particularly Tamils, filled many civil service positions. In the British colony, Tamils on the whole enjoyed better education, and were thus frequently employed under the British-run administration.

12. Since independence in 1948, the primary conflict has been between the Sinhalese and Tamils. Following independence a progressive rejection of at least parts of the Island's colonial inheritance and domestic rivalries served to accentuate ethnic and religious divisions within the country. Because of their overwhelming majority, the position of the Sinhalese became more dominant while the Tamils became increasingly marginalized. During the

initial stage of the conflict, the question of language rights was the key area of contention between these communities. Sinhalese activists charged that English-educated minorities wielded disproportionate power on the national level, and that Buddhism and the culture associated with it lacked protection as long as its supporters were excluded from governing. Tamil activists, on the other hand, resented a perceived tendency on the part of Sinhalese partisans to equate their own ethnic nationalism with Sri Lankan nationalism.

13. What began as a struggle for cultural affirmation, political representation, economic advancement and linguistic parity between Sinhalese and Tamils ended in violence and armed conflict. The overriding political issue in Sri Lanka therefore became the demand by some Tamil groups for an independent Tamil State ("Ealam") comprising the Northern and Eastern provinces of the country.

14. The 14-year-old armed conflict in the north and east of Sri Lanka continues to be costly in human and economic terms. Over 50,000 persons have lost their lives, many more have been injured and over half a million are internally displaced.

15. With regard to the political developments since independence to 1993, the Special Rapporteur would like to refer to the report of the Representative of the Secretary-General on internally displaced persons, Mr. Francis Deng, submitted to the Commission on Human Rights pursuant to his mission in Sri Lanka in November 1993 (E/CN.4/1994/44/Add.1, paras. 14-21 and 26-34).

16. After the April 1994 elections, the newly appointed Government, the people's Alliance (PA), initiated a process of negotiations with the Liberation Tigers Of Tamil Ealam (LTTE). The talks were suspended in October 1994 after Gamini Dissanayake, presidential candidate for the United National Party (UNP), and more than 50 others were killed at an election rally by a suicide bomber suspected of belonging to the LTTE. The delegations met again in Jaffna in early 1995 and on 8 January a cessation of hostilities agreement came into force. However, on 18 April 1995 the LTTE withdrew from the talks and renewed its attacks. In the following months, the fighting between the security forces and the LTTE intensified.

17. The Government of Sri Lanka announced on 18 May 1995 a "war for peace". The state of emergency, which had been briefly lifted at the time of the elections in 1994 and reimposed in the north and east and in Colombo and surrounding areas after the killing of the UNP presidential candidate in October 1994, was gradually extended to other parts of the country. The state of emergency was initially reinstated in parts of Gampaha district in June 1995 but was extended throughout Gampaha district in September 1995, and to parts of Moneragala district in December 1995. In mid-April 1996, it was imposed throughout the country.

18. The Government also reintroduced some of the security measures that had been abolished (fully or partly) after it came to power. On 20 April 1995, two days after the LTTE withdrew from negotiations, a ban on the transport of certain items (including cement, batteries and motor vehicle spare parts) to the areas under LTTE control was reintroduced. In addition, the lagoon

separating the Jaffna peninsula from the rest of the country and the coastline of all districts in the north and east were declared a "prohibited zone" and the use of force or firearms for its enforcement was authorized.

19. During the Special Rapporteur's stay in Sri Lanka, he was informed that the army was continuing Operation "Jaya Sikuru" which was launched by the Government on 13 May 1997 in order to control the main road from the south to the north of the country.

B. Visit to Jaffna

20. The Jaffna peninsula in northern Sri Lanka has been under the control of the Liberation Tigers Of Tamil Ealam (LTTE) since mid-1990. Between July and December 1995 the security forces undertook two large military operations, code-named "Operation Leap Forward" and "Operation Riviresa (Sunshine)", in the western half of the Jaffna peninsula, including Jaffna town, the LTTE stronghold in the north. They took control of the town in early December. Further large military operations ("Operations Riviresa II and III") were launched in April and May 1996, resulting in the security forces taking control of the eastern side of the peninsula.

21. During the late 1995 offensive, the LTTE ordered civilians to vacate the area, including Jaffna town. Several people recounted to the Special Rapporteur how they hurriedly left Jaffna after the LTTE announced over loudspeakers on 30 October that everybody had to leave by midnight. The Special Rapporteur was told that those who refused to leave were forced to by intimidation.

22. The Jaffna peninsula, which returned under Government control in early 1996, is now experiencing a process of resettlement and rehabilitation. The present population is around 470,000 persons but continues to increase progressively with the return of internally displaced persons (IDPs) from the adjacent Vanni region. Over 300,000 people are dependent upon free government dry food rations, including 60,000 people who are still displaced within the peninsula (UNDP figures).

23. While in Jaffna, the Special Rapporteur met with Major General P.A. Karunatilake, the military commander in charge of the peninsula, and the military commander in charge of the Valikamam (the western part of the peninsula) and their respective staffs; the recently appointed Magistrate of Jaffna; the coroner and several lawyers including representatives of the Bar Association of Jaffna. Unfortunately, and despite his specific request, the Special Rapporteur was not able to meet with representatives of the police department in Jaffna. With respect to deaths in the course of armed confrontation, the Special Rapporteur was told by the military authorities that in the Jaffna area, between January 1997 and August 1997, 32 civilians, of whom 40 per cent were women and children, were killed; 68 LTTE members and 41 security officers were also reportedly executed.

24. The Special Rapporteur wishes to note that while in Jaffna town, and despite the curfew which is still in force from 8 p.m. to 5 a.m., he generally observed that during daylight, there were visible signs of an easing of

tension in the life of the people. However, although there has been a re-establishment of a government administration in the Jaffna peninsula, the military remain in control of the city.

25. By the time of the Special Rapporteur's visit in September, conditions had improved but concern about the freedom of movement, fear of disappearances, arbitrary arrests and executions remained. According to people in Jaffna, the fact that they are Tamils casts suspicion on them, regardless of whether they are sympathizers to LTTE or not.

26. The security forces, comprised of members of the army and the police, are 99 per cent Singhalese, do not speak Tamil, which is the language of the local population, and very often treat the local population with suspicion. This amplifies the sense of an army occupation and exacerbates the already existing feeling of alienation.

27. With regard to the freedom of movement in Jaffna, the military has put into place checkpoints throughout the streets of the city to control the movement of civilians; the inhabitants are systematically inspected several times a day. For Tamils, travelling from Jaffna peninsula to other parts of the country involves such complicated procedures that it is virtually impossible, in particular for people wanting to travel to Colombo. A pass system involving the issuing of residence passes, day passes, week passes and passes for travel to Colombo has been in place since 1991. Furthermore, the military told the Special Rapporteur that for security reasons it had instituted procedures for people crossing from territories controlled by the LTTE to territories controlled by the security forces. People who arrived from LTTE-controlled areas were often described as "defectors" by the military, who were apparently unclear about how to process their cases.

28. The judiciary and the courts in Jaffna did not function for almost 10 years, from 1986 to 1996. During the Special Rapporteur's visit, he was told that only Jaffna Court was functioning.

Meeting with the Magistrate

29. During the Special Rapporteur's meeting with the Magistrate in Jaffna, he was told that the Office had reopened on 1 March 1996. By the time of the visit, there was one Magistrate and three judges (one in Jaffna, one in Mailakan and one in Kayts). They deal with all civil and criminal cases. According to the Magistrate, most of the criminal cases concern trade in illicit liquors and disputes over lands.

30. With regard to the number of extrajudicial killings in Jaffna, the Magistrate indicated to the Special Rapporteur that 38 cases had been filed, resulting from confrontations reported by the police, with his Office for the period January to September 1997. With respect to such cases, a post-mortem examination is carried out and the Magistrate receives the report. After a post-mortem, the Magistrate cannot automatically deliver a death certificate; an inquiry is needed. Of the 38 cases, 31 involved murders which fell under the Emergency Regulations and thus, without any inquiry, they were sent to the Deputy Inspector General of Police. As a result, the Magistrate was unable to deliver death certificates to the families, because there was no registration

of the deaths. As such, families cannot receive any compensation. The Magistrate added that the bodies of the terrorists are not given back to the families and that he had no records of death of women or children under the Emergency Regulations; all such deaths were determined to have occurred under the normal regulations.

31. With regard to detention cases, the Magistrate reported that there were no cases of death while in custody and that every two weeks he receives a list of persons in detention; according to a list received in August, the number was 31 persons. However, the Magistrate was not informed when a person was moved from one centre of detention to another.

32. Finally, the Magistrate indicated that since March 1996, he had not been aware of any reports of mass graves in Jaffna peninsula, but even if a mass grave was discovered, he would not automatically be informed.

33. During the Special Rapporteur's stay in Jaffna there were reports of arbitrary arrests, torture, disappearances and extrajudicial executions, several of which were attributed to military forces. They are discussed below under the relevant subject headings.

C. Visit to Batticaloa

34. During the Special Rapporteur's short stay in Batticaloa, he felt that the situation was tense and was told that regular security incidents, resulting sometimes in the death of civilians, were occurring in Batticaloa and its surroundings. The Special Rapporteur noticed that although there was no curfew in force in the city, the local population was not yet ready to walk in the streets after dark. All the representatives of non-governmental organizations and other individuals declined to meet with the Special Rapporteur after dark. Only one representative of an NGO agreed to meet with the Special Rapporteur in the evening, on the condition that the meeting took place at his private residence. While travelling to the meeting-place, at about 7 p.m., the Special Rapporteur noticed that his car was the only one on the road. He also felt the nervousness of the soldiers at the several checkpoints through which his car had to pass.

35. These are the results of the LTTE's low-intensity, guerrilla-style war in that region, mainly in rural areas. After dark much of the countryside is allegedly at their mercy, with the killing of soldiers and civilians considered to be traitors not uncommon.

36. In Batticaloa, the Special Rapporteur was told by the military staff that many areas were gradually being pacified and "cleared" and that the rebels were now confined to the jungles in the interior. However, a few days before his arrival, the LTTE had shelled some parts of the city. He also noticed that every morning, soldiers had to clear the main road leading to the city in order to ensure that no mines had been planted during the night. In this regard, he noticed that no vehicle could leave the town before 10 a.m.

The judiciary in Batticaloa: meeting with the lawyers

37. While in Batticaloa, the Special Rapporteur met with representatives of the Bar Association and the Additional Magistrate. During the meeting, he was told that 25 lawyers of different origins (Muslims, Tamils and Singhalese) were officiating in Batticaloa district. Among them were three women. They reported on several cases of arbitrary arrests.

38. When persons are arrested under the Emergency Regulations Act (ERA) or Prevention of Terrorism Act, the accused are not informed about the charges and during the investigations the authorities present their own version of the facts, but not the version of the accused. There are repeated allegations of confessions extracted under torture. When the suspect is Tamil, the statement of the confession is written in Singhalese, a language that the victim often does not understand. In most of these cases, the Special Rapporteur was told that the only interest of the police is to get the statement of the confession signed, so the accused can be sent directly to the High Court.

39. With regard to cases of executions, the Special Rapporteur was told that families are reluctant to claim the body of their relatives. Close relatives who want to claim the body of the victim are required to declare that the victim was a terrorist. Failure to do so will result in the body not being given to the family. Due to these conditions, families are afraid to claim the body, and several bodies remain unclaimed.

40. Post-mortem reports are drawn up in respect of those deaths which fall under the ERA. For the first eight months of 1997, the Special Rapporteur was told that 35 cases had been investigated. However, when the police bring the bodies to the hospital and the Magistrate asks for the file, it is often said that the person had been killed in the course of an armed confrontation. It is the police who decide whether or not a case of execution falls under the ERA. The police also have the right to keep the body.

41. Soldiers convicted of rape or other crimes could be granted bail once the investigation is completed. While on bail, the same soldiers are often transferred to other parts of the country, thus making it difficult to trace them. Often, they will not report for further investigation.

II. THE RIGHT TO LIFE: FINDINGS AND CONCERNS

A. Violations of the right to life in the context of armed conflict

42. Cases of extrajudicial executions occur in the context of internal armed conflict in the country, mainly the confrontation between the LTTE and government forces in the north and north-east of the country.

43. Areas of armed conflict continue to be the scene of large-scale human rights violations and abuses by members of the security forces, paramilitary groups (home guards), often said to cooperate with them, and the armed insurgent groups (LTTE). The Special Rapporteur was informed that, during mid-November 1997, the military resumed the third and final phase of the operation "Jaya Sikurui" (Sure of Victory), intending to regain control of the

main road leading to the Jaffna peninsula. Over 1,500 fighters from both sides have died in the confrontation since the inception of the military operation in May, and up to 5,000 have sustained injuries.

44. In these areas, the armed forces allegedly continue to apply a counter-insurgency strategy whereby everybody who is known or suspected to be linked with the LTTE is regarded as an internal enemy. According to the information received, in the areas where the insurgents are active and armed confrontations take place, the security forces view virtually all civilians as collaborators with the subversion, an allegation which was denied by the members of the armed forces met by the Special Rapporteur.

45. The category of "LTTE terrorist" is applied to everyone who is regarded as supporting the LTTE in one way or another, even if the insurgents use force to obtain, for example, food or money from civilians. Consequently, peasants become the main victims of human rights violations in areas where there is armed conflict. Similarly, a large number of those who dared to denounce human rights abuses committed by the LTTE have been killed by LTTE members or forced to leave their areas of residence. As a result, human rights activists and witnesses to human rights violations fear for their lives and in many cases prefer to remain silent.

46. Military operations leading to the death of civilians include indiscriminate bombing of civilian settlements and armed incursions into villages during which the victims are said to be killed on the spot or abducted to extract information. Often, the civilians killed during such operations are later presented to the public as terrorists who died in combat with guns and grenades placed in their hands. Their corpses are not given back to the families.

47. From January to August 1997, there are reports that an estimated 37 civilians were killed and 30 others wounded as a result of shelling in civilian areas. The following incidents are said to have taken place:

(a) At Kalmadu camp on 24 April 1997, at about 3:00 p.m., the LTTE and the military engaged in a shoot-out. Civilians from the camp fled towards the jungle to avoid the crossfire. According to reports, soldiers from other camps in the area fired in the direction of the shooting. Civilians from the camp were caught in the shellfire which continued until about 6 p.m. Five people from the camp, including a four-year-old girl, were reportedly killed and 12 others were injured, including eight children;

(b) In Kallady, Batticaloa, on 24 August 1997, four-year-old Maris Sulosanathevi was killed following shelling by the LTTE at Kallady Veloor colony, which is about 3 km from Batticaloa town and about 3-4 km from Kallady army camp. Thirteen other people were also reported to be seriously injured in the attack.

48. Torture is reportedly used by the armed forces with two principal aims: to obtain information on insurgent groups and to intimidate the population. Torture, inflicted at the place of detention, in remote places in rural areas or on military and police premises, reportedly precedes the taking of a

decision as to whether the detainee is released or put at the disposal of the competent judicial authority. It seems to be a common practice that members of the armed forces and security forces arrest persons without a warrant, subject them to interrogation and take them to the judge days later, after forcing them to sign a statement of good treatment. All these circumstances, together with the fact that the detainees are kept incommunicado, increase the risk of torture.

49. The Special Rapporteur is concerned that during armed confrontation or following battles between the military and the insurgents, no prisoners are taken. He was told that the Tamil insurgents usually use poisoned pills and prefer to commit suicide rather than be captured by the armed forces. Taking prisoners is so exceptional that when it happens, it becomes a major news event recounted by the national media.

50. The reports received by the Special Rapporteur clearly indicate that neither the security forces nor the armed insurgent groups show respect for the right to life or physical integrity in areas of armed conflict. On the contrary, the Special Rapporteur received numerous reports about human rights violations by various military battalions and other units of the security forces based in the zones of armed conflict.

B. Violations of the right to life committed by the LTTE

51. In February 1988, the LTTE announced that it will abide by the Geneva Conventions and their Additional Protocols, but consistent reports received by the Special Rapporteur indicate that they fail to do so.

52. The Special Rapporteur received numerous reports concerning abuses committed against the civilian population by members of the LTTE. Peasants are said to be forced to provide the guerrillas with food and money. If they refuse, they are killed. They may also be forced to leave the area. It has also been reported that members of the security forces captured in combat are very often executed. Moreover, former combatants who have sought reinsertion into civilian life have reportedly been targeted by their former comrades in arms. The following incidents were reported:

(a) On 1 June 1997, a Sinhala youth married to a Tamil woman was killed by the LTTE in Shanthiveli in Batticaloa;

(b) On 9 June, R.K. Gunaratna Banda, a farmer in Amparai, was shot dead by the LTTE, and on 12 June, S. Krishnapillai was also shot dead by members of the LTTE "pistol gang" in Valaichchenai. On 19 June, at Grama Sevaka in Amparai district, S.R.M.D. Banda was also shot dead by LTTE members.

53. In addition, the LTTE continues to use terror throughout the country. Several reports and incidents relate that one of the tactics of the LTTE is to operate through suicide attacks, including using children and women. For example, in Colombo itself, on 15 October 1997, a bomb exploded in the same hotel where the Special Rapporteur had stayed one month earlier. The bombing of the hotel and the subsequent shootings resulted in the death of more than 18 civilians with over 100 people wounded.

54. In certain areas, the LTTE is said to have replaced the State administration and to exercise complete control. This is viewed as a complicating factor in peace negotiations: the question is no longer that of convincing the LTTE just to hand in their arms and halt the fighting, but also to give up power and control over these areas and lucrative sources of income.

C. Violations of the right to life committed by home guards

55. Several paramilitary groups, referred to as home guards, and militia of political parties continue to operate in the north and north-east. These home guards, or "friends of the army", are Sinhalese and Muslim civilians recruited and armed by the police and given short training in the use of weapons in order to take care of their own communities, to defend themselves against extortion by the insurgents and to protect their economic and social positions. They function mostly under the authority of the local police, although in some areas they work alongside the army. Their functions are supposed to be purely defensive, but the Special Rapporteur was told that they often act as auxiliary forces, doing the "dirty jobs".

56. According to the information received, there have never been serious attempts on the part of the security forces to restrain the activities of such groups or to dismantle and disarm them. On the contrary, the military began to cooperate with self-defence groups, considering them useful allies in the common interest of fighting the LTTE. In some regions, armed groups were said to have been trained in military establishments and are operating under the direct command of the armed forces. The Special Rapporteur was told by members of the High Military Command, however, that their aim was to control these groups.

57. This cooperation between Muslims and Sinhalese has provoked retaliatory action by Tamil insurgents against Muslim villagers and home guards. The following incidents were reported:

(a) On 27 September 1996, at Marathamunai, Batticaloa district, a number of Muslim home guards were reportedly abducted by armed men. Their bodies were found in the cemetery the next day. Muslims in the area accused the LTTE of the murders and there were also anti-Tamil incidents which resulted in more than 30 people killed;

(b) On 9 February 1997, in Valaichchenai, a Muslim home guard attached to the Valaichchenai police station was allegedly killed by the LTTE in Ottamavadi, near Valaichchenai. This resulted in a clash between Tamils and Muslims in the town. Three Tamils were reported killed and several injured. Three Muslims were later abducted by the LTTE, as a reprisal, and killed.

D. Violations of the right to life committed in the context of political violence

58. Another issue which was brought to the attention of the Special Rapporteur by many persons and organizations with whom he met while on mission is the issue of violence in the political context. The Special Rapporteur learned that most, if not all of the political party leaders have their own private armed security guards. The 225 members of Parliament are authorized

to have up to eight armed security guards, and the 300 provincial counsellors are also authorized by the Ministry of Defence to have up to four armed security guards each. This has resulted in a competition between the regular police and the privately armed guards, the consequence of which is a situation of political violence, which particularly increases during election time.

59. A report, published on 25 April 1997 by the Centre for Monitoring Election Violence (CMEV), reproduced an account of election-related violence during the local government election campaign. In the period from 5 February to 20 March 1997, 2,237 incidents of violence were reported in 30 police divisions covering all areas where local government elections had been scheduled for 21 March 1997. Of these incidents, the greatest number were allegations of threats of violence, followed by assault, mischief, damage to property and intimidation. Five reports of murder and two of attempted murder were received by the Centre, as well as 40 complaints of injury, 53 of robbery, 50 of arson and 67 unclassified complaints. Although the police were present when the incidents occurred, very few of the cases have been investigated by the authorities and none of these cases were brought before the court.

60. Impunity with regard to cases of political violence seems to be prevailing throughout Sri Lanka. The following is a sample of the incidents reported during the run-up to the elections (information provided by CMEV):

(a) On 25 February, at Pamunugama, internal rivalry within the PA resulted in the death from shock of a woman and damage to five houses. The complaint was lodged by a PA supporter against seven other PA supporters, and allegedly the initial incident which sparked off the tragedy, related to the putting up of a poster. No arrests had been made by the police despite the alleged assailant being identified;

(b) On 27 February 1997, PA member of Parliament D.M. Dassanayake is alleged to have forcibly entered the Madawakkulama mosque in Puttalam district, accompanied by a gang of men armed with T-56 rifles, and destroyed all the green lights in the mosque because green was the UNP colour. This gang is alleged to have abused the devotees present and threatened the UNP Muslim candidate with death if he did not withdraw from the election. On the same day, at around 4.30 p.m., Mr. Dassanayake, accompanied by approximately 50 armed supporters, is alleged to have stormed Karaitive (sic) village, brutally assaulted Mr. David, the brother of UNP candidate Mr. Marcus Fernando, and threatened him with death. On 1 March, at 5.30 p.m., Mr. Dassanayake and his supporters allegedly assaulted Mr. W.M. Wimalaratne Banda (a former UNP official) and his aides at Madyama, Attavilluwa. In all 10 people were injured, three of them seriously. It is further alleged that Mr. Dassanayake's party was escorted to and from the scene of the alleged crime by a police group led by the Inspector of Police of Puttalam.

61. Moreover, members of Tamil political parties opposed to the LTTE continue to be armed whilst carrying out functions which are part of the overall responsibility of the security forces, particularly in the north and east, without any clear legal basis for such a practice.

III. APPLICABLE LEGAL INSTRUMENTS

A. Human rights and humanitarian law

62. The applicable standards of international law reside primarily in the obligations undertaken by Sri Lanka as a result of its accession to the following instruments. Sri Lanka has signed the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights. Sri Lanka acceded to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in January 1994. It is legally bound to implement the human rights safeguards required by these treaties, including respect for the right to life (article 6 of the ICCPR) and the right not to be tortured (article 7 of the ICCPR and the Convention against Torture). Article 4 of the ICCPR clearly states that both rights need to be upheld at all times, even "in time of public emergency which threatens the life of the nation". In addition, Sri Lanka is also a State party to the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Discrimination against Women. In October 1997, Sri Lanka became a party to the Optional Protocol to the International Covenant on Civil and Political Rights. However, Sri Lanka is not a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

63. International humanitarian law requires that minimum norms be respected in internal armed conflicts. The norms and specific standards of international human rights law also apply in situations of armed conflict, and may be deviated from only by permissible derogations. Sri Lanka is a party to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 and is, therefore bound by its provisions. Article 3 of the Convention (common to the four Geneva Conventions and applicable to situations of internal armed conflict) provides for minimum standards of protection to civilians.

64. In addition to its treaty obligations, Sri Lanka is also obliged to respect the relevant rules of international customary law, particularly those concerning the "elementary considerations of humanity" in times of armed conflict as well as in times of peace as expressed by the principles in common article 3 of the Geneva Conventions of 12 August 1949. Sri Lanka has not, however, signed Protocol II Additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, which develops and supplements common article 3.

65. The following fundamental guarantees contained in common article 3 to the Geneva Conventions of 12 August 1949 are also applicable in all situations pertaining to Sri Lanka:

> "1. Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause,

shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

"To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

"(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

"(b) Taking of hostages;

"(c) Outrages upon personal dignity, in particular humiliating and degrading treatment;

"(d) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

B. The relevance of the situation of armed conflict

66. International human rights standards as set out above are very clear: torture, disappearances and extrajudicial executions can never be justified under any circumstances, not even in time of war. Regardless of who may be responsible for the initiation of a war, and faced with the reality that war or armed conflicts short of war continue to inflict their pain on humanity, international human rights law requires that its norms continue to be respected.

67. The Special Rapporteur is aware that the LTTE controls several parts of the country in the north and north-east. Under these circumstances, and notwithstanding the continuing validity of human rights standards throughout the duration of the conflict, it is acknowledged that the conflict is of such a nature as to have reached the threshold of applicability of article 3 common to the four Geneva Conventions of 1949. In addition to these standards, and though Sri Lanka is not a party to the Additional Protocol II, there are standards in this protocol which are essentially the same as those expressed in the instruments of international human rights law (to which the Protocol explicitly refers in its preamble), namely: protection of the right to life, protection from torture and mutilation, protection against arbitrary punishments, protection against outrages upon personal dignity, protection against pillage, protection against threats of any of the aforementioned, respect for the rights of those in detention against whom penal prosecutions have been initiated, protection of the wounded and of medical personnel and protection of the civilian population in general, including protection of objects indispensable for their survival and cultural objects and places of worship. Indeed, it should be observed that many of those most fundamental protections may be said to be part of the customary law of human rights. It must be stressed that in the case of armed conflict, the response of the Government must always be relevant and proportionate, such that the standards of human rights may be respected for every individual in every case; the

existence of an armed conflict does not permit a carte blanche response. Any violations on the part of the insurgents (LTTE), which the Special Rapporteur acknowledges are most likely to have occurred and to continue to occur, cannot be used as an excuse for violations by the Government.

68. The notion of "special" or "exceptional" circumstances is known to international law as such circumstances as may require the application of special standards or permit derogation from the application of normal standards. Such a notion is specifically foreseen by and accommodated in international standards. When addressing Governments and armed opposition groups in the context of armed conflict, the Special Rapporteur is guided in particular by the protection of the individual enshrined in common article 3 which forbids Governments and armed opposition groups alike to torture, to deliberately kill civilians taking no part in hostilities, to harm those who are wounded, captured or seeking to surrender, or to take hostages.

C. The national legislation

1. Legal framework

69. The Constitution of Sri Lanka of 1978, in its chapters III and IV, guarantees to the people of that country a number of fundamental rights, such as the right to equality, freedom of movement and of choosing their place of residence in Sri Lanka and to leave and return to Sri Lanka, and the right not to be subjected to torture or to arbitrary arrest and detention. With regard to derogations, article 15.7 of the Constitution establishes that the exercise and operation of the right to equality and non-discrimination and the freedoms of expression, association, movement and peaceful assembly, "(s)hall be prescribed by law in the interest of national security, public order and the protection of public health or morality".

70. The death penalty is permitted under Sri Lankan law and remains a legal punishment; nevertheless, no death sentence has been carried out since 23 June 1976. Since then courts had to pass sentences of death for offences where this is mandatory, but the sentence has always been commuted by the President in the exercise of his power to do so. Government officials confirmed to the Special Rapporteur while he was in Colombo that there was no intention to implement the death penalty under any circumstances. He was also told that the right to life will be reflected in the new Constitution of Sri Lanka, a draft of which was given to him.

71. The introduction in law of procedures and safeguards is not, however, in itself sufficient to protect human rights. The Special Rapporteur will focus mainly on certain aspects of the regulations related specifically to his mandate, examining laws and procedures which might facilitate the commission of violations of the right to life, and making recommendations for legal and procedural safeguards to protect against them.

72. Of particular concern are the emergency regulations governing arrest and detention procedures and those governing post-mortems and inquests when deaths have occurred in custody or as a result of the official action of the security forces. The regulations still provide for indefinite preventive detention on renewable, three-monthly detention orders. Sri Lanka has been under an almost

continuous state of emergency since May 1983. During a declared state of emergency, which has to be renewed monthly by Parliament, the Emergency (Miscellaneous Provisions and Powers) Regulations (ERs) are in force. These regulations are issued under the Public Security Ordinance and are altered from time to time. Official emergency measures override the safeguards contained in the normal law and have granted sweeping powers to the security forces. In addition, there have been repeated allegations of intimidation of lawyers, relatives and others attempting to take remedial action through the courts.

73. The emergency regulations governing post-mortems and inquests have not been altered significantly. The thorough investigation of all relevant deaths is an important means of preventing extrajudicial executions by security forces personnel. The procedures provided under the regulations still fail to provide an adequate investigative procedure and could lead to impunity for those committing extrajudicial executions.

2. Prevention of Terrorism Act

74. In 1979, Sri Lankan Parliament adopted the Prevention of Terrorism Act (PTA) in response to growing political violence in the country, especially in the "Tamil areas". Although the PTA was seen as an effort to contain what by then amounted to civil war, its unusually broad provisions are said to have increased tensions instead. Indeed, the Prevention of Terrorism Act contains a number of disturbing provisions from the human rights perspective. Section 6 of the Act provides that:

> "any police officer not below the rank of Superintendent or any other police officer not below the rank of sub-Inspector authorized in writing by him ... may, without warrant, ... notwithstanding anything in any other law to the contrary
>
> "(a) arrest any person;
>
> "(b) enter and search any premises;
>
> "(c) stop and search any individual or any vehicle, vessel, train or aircraft; and
>
> "(d) seize any document or thing connected with or concerned in any unlawful activity."

The Act also provides that a person may be detained for periods of up to 18 months (renewable by order every 3 months), if "the Minister has reason to believe or suspect that any person is connected with or concerned in any unlawful activity" (sect. 9). The same section provides that such a person may be detained "in such place and subject to such conditions as may be determined by the Minister". This may lead to having persons detained without access to attorneys or to relatives for prolonged periods.

75. The Act does not expressly exclude coerced confession as evidence but rather provides that confessions made by a person orally or in writing, at any time, can be admissible as evidence unless made to a police officer below the

rank of Assistant Superintendent (sect. 16). Thus, confessions made to police under torture or threats may be admitted. It provides that a statement recorded by a magistrate or made at an identification parade shall be admissible in evidence even if the person is dead or cannot be found and thus cannot be cross-examined (sect. 18 (1)(a)). Any document found in the custody of a person accused of an offence under the Act may be produced in court as evidence of the facts stated therein (sect. 18 (1)(b)).

3. Emergency Regulations Act

76. Emergency rule prevailed throughout most of 1994, except just before the parliamentary general elections. The Special Rapporteur understands that there were, however, important changes, both in the geographical areas in which the emergency was in force during different periods, as well as in the content of the regulations. During his visit to Sri Lanka, many persons, including human rights advocates and law enforcement agents, did not agree on what regulations were in force and where. In this section, the Special Rapporteur has relied on information and documents provided to him by the Nadesan Centre, a Sri Lankan non-governmental organization which keeps track of all the changes and informs the public.

Emergency regulations relating to inquests into the death of persons due to actions of police officers or members of the armed forces

77. Inquests into deaths under the normal law are dealt with by the Code of Criminal Procedure Act No. 15 of 1979 which contains very salutary provisions relating to inquests into deaths, with inquirers and magistrates being given wide powers to ascertain the cause of death, e.g., summoning witnesses, post-mortem examinations, etc. However, the emergency regulations permit derogation from these provisions; the relevant provisions are to be found in regulations 43 through 47 of the Emergency (Miscellaneous Provisions and Powers) Regulations No. 4 of 1994 published in the Official Gazette 843/12 of 4 November 1994.

78. Regulation 43 makes provision for deviation from the normal law in instances where a police officer (rank not stipulated) or a member of the armed services (rank not stipulated) has reason to believe that the death may have been as a result or in the course of armed confrontation between the police, armed services or any member of any supplementary forces (established under law) and forces engaged in waging war against the Government of Sri Lanka. In such a situation the Superintendent of Police or the commanding officer of the armed forces unit (as the case may be) "shall, notwithstanding anything to the contrary in chapter XXX and section 9 of the Code of Criminal Procedure Act ... or the provisions of any other written law, report the facts relating to the death to the Inspector-General of Police or to the nearest Deputy Inspector-General of Police".

79. The salient features of this provision are as follows:

(a) The purpose of an inquest is to determine the manner and circumstances of death and a proper means of doing this is provided by the normal law. The bypassing of the normal law by the emergency regulations is, however, made dependent on significant questions of fact, including (i) that

the death took place in the course of an "armed confrontation" and (ii) that the victim was engaged in waging war against the Government. How are these questions to be determined except by a proper judicial inquest?

(b) The words "where a police officer or a member of the armed services has reason to believe ..." are the key. What triggers off the whole process of avoiding an inquest is the claim, by any police officer or any member of the armed services, that there was an armed confrontation and that the victim was waging war, etc.

(c) It is sufficient for the police or security officer to make the claim of armed confrontation for an inquest to be avoided.

80. This emergency provision remains wholly inadequate for the full and impartial investigation of a death caused by security forces and could be used to cover acts of extrajudicial execution committed by the security forces.

81. According to regulation 44 (report of an incident), once the IGP or the DIG receives information as provided for by regulation 43, he has to direct an officer not below the rank of Assistant Superintendent of Police to proceed to the scene of the incident and record his observations and the statements of persons who appear to be acquainted with the circumstances relating to such death. If the body is found, the death must forthwith be reported to the Magistrate.

82. What is contemplated here is that the death should be investigated by a responsible police officer and reported to the Magistrate in instances where the body is found. These are commendable provisions, but what needs to be looked into is the extent to which they are in fact complied with.

83. Under regulation 45 (post-mortem and burial or cremation), the Magistrate shall, upon the receipt of the facts from the IGP or the DIG, direct the Government Medical Officer to hold a post-mortem, and will also make an order that at the conclusion of the post-mortem the body shall be handed over to the DIG for disposal. The DIG in turn can hand over the body to any relation who claims it, subject to conditions or restrictions imposed in consideration of national security or public order, or otherwise authorize the burial or cremation of the body in accordance with steps he may deem necessary in the circumstances. It would appear that although the Magistrate has to be informed forthwith in instances where the body is found (regulation 44), there is no provision which enables him to order a post-mortem on his own; he has to await the receipt of facts from the IGP or DIG.

84. This procedure can be invoked by the police on the basis of a statement by any security forces officer that a death resulted from armed confrontation. Once the IGP decides to apply for a High Court inquiry under the emergency procedures, no other inquiry into the cause of death can be held according to the procedures provided under the normal law. The proper investigation of deaths caused by the security forces can thus be prevented, and this procedure could be used to allow impunity.

85. According to regulation 46, the High Court in Colombo is vested with exclusive jurisdiction to inquire into the death of any person caused or purported to have been caused in circumstances specified in regulation 43. Upon application by the IGP, the High Court shall hold an inquiry into the cause of death of the person named as deceased in such application, and if there are any proceedings pending in any Magistrate's Court in respect of the same death, such proceeding shall be transferred to the High Court. The High Court may hold such inquiry or part of such inquiry in any part of Sri Lanka, having regard to the interest of national security and public order. The Government Medical Officer who conducted the post-mortem has to forward his report to the High Court and he shall not disclose anything contained therein to any person unless authorized to do so by the High Court. The IGP has to forward to the High Court the report of the preliminary observations and other documents necessary for conducting the inquiry, and the judge of the High Court shall record such evidence as may be placed before him by the IGP or his representative. At the conclusion of the inquiry the judge of the High Court has to transmit the record of evidence and a report of the circumstances under which the death was caused, together with any other documents, to the Attorney-General.

86. There are many unsatisfactory features in this provision:

(a) The inquiry into the death takes place only upon the application of the IGP and there are no criteria to guide him in the exercise of his function. Indeed it would be difficult to expect impartiality from him where his own officers would be involved. This may put him in an unacceptable and difficult situation;

(b) The post-mortem report should not be kept secret when death occurs in circumstances specified in regulation 43. Relatives or their representatives should have access to it;

(c) It might be necessary to have more courts than just the High Court in Colombo inquire into such deaths;

(d) It is unsatisfactory that the recording of evidence by the judge should be confined to "evidence as may be placed before him by the IGP or his representative". The judge should also be permitted to receive evidence as he deems fit. This was reportedly the case in an earlier version of the regulations which empowered the Court to hear "the evidence of any other person who appears to be acquainted with the circumstances relating to the death under inquiry", but this was deleted in 1989;

(e) There should be provision for relatives or any other person representing the dead person to intervene in the proceedings. The findings of the High Court should also be made available to them.

87. Under regulation 47, if the Attorney-General is satisfied, upon the receipt of evidence and other documents transmitted to him by the High Court, that the commission of an offence has been disclosed, he may institute appropriate legal proceedings against the perpetrators.

88. When the Special Rapporteur met with the Attorney-General he was given the following statistics relating to the arrests and detention of persons from the north and east of Sri Lanka under the Prevention of Terrorism Act and the emergency regulations:

(a) Year 1996:

(i) From the Eastern Province - 321; from the Northern Province - 378;

(ii) Number of concluded matters - 679; the remaining matters would be concluded once the necessary documents are available,

(b) Year 1997:

(i) From the Eastern Province - 127; from the Northern Province - 221;

(ii) Number of concluded matters - 238; the remaining matters would be concluded expeditiously. In most of the unattended cases the delay could be attributed to the non-availability of some of the documentary evidence such as the government analyst's report, the ballistics expert's report, etc. Once the reports are made available by the relevant authorities these matters would be finalized speedily.

89. Both the ERs and PTA give the security forces wide powers to arrest suspected opponents of the Government and detain them incommunicado and without charge or trial for long periods. The ERs allow for detainees to be held in preventive detention on the order of the Secretary, Ministry of Defence, for one year without being brought before a court. After that, indefinite extensions are possible, although only on the order of the Magistrate. The Magistrate, however, has limited powers to exercise discretion, and must apparently reach a decision solely on the basis of a report from the Secretary, Ministry of Defence. People suspected of actually having committed an offence under the ERs can be detained for up to 60 days if their arrest takes place in the north or east and relates to offences committed in that area. In Colombo and surrounding areas, this period is seven days. The PTA allows for detention on an order by the Minister of Defence for three months. This period can be extended up to a maximum of 18 months. In addition, there are no laws governing conditions in places of detention other than prisons such as army compounds and police stations.

90. The Special Rapporteur wishes to note that preventive detention could be a source of torture, cruel, inhuman and degrading treatment, disappearances and extrajudicial executions. Lengthy preventive detention is not in conformity with international standards and safeguards on human rights; it denies the rights to due process, presumption of innocence, fair trial and personal freedom.

IV. ACTION BY THE GOVERNMENT OF SRI LANKA REGARDING CASES OF EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS

A. Investigation of cases of human rights violations

91. When he met with the Attorney-General, the Special Rapporteur requested information about any follow-up action taken with regard to certain cases and was told that the Government had taken action to investigate several incidents of human rights violations that occurred in the country. In this regard, the Special Rapporteur was provided with information about the following well-known cases.

92. Embilipitiya case. Between 1 August 1989 and 30 January 1990, 25 schoolchildren from Embilipitiya Central College and nearby schools were abducted from their homes and places of residence. They disappeared thereafter. The Criminal Investigation Department (CID) was called in to investigate the matter in 1992. It was revealed during the investigations that the abductors were army personnel from the Sevena camp at Embilipitiya. The CID forwarded their notes of investigation to the Attorney-General who indicted nine suspects in the High Court of Ratnapura. The first accused is the Principal of Embilipitiya Central College, the second to sixth accused are army officers, one of them a brigadier; the seventh to ninth accused are ordinary soldiers. The second accused is the son of the first accused. The indictment contains 83 charges in relation to the abducted students. The trial commenced on 22 January 1996 and is still continuing. The Special Rapporteur was told that this case was due to be concluded during the course of 1997.

93. Kumarapuram and Mailantenna incidents. These cases relate to the killing of 24 villagers and 35 villagers in February 1996 and August 1992, respectively, in Trincomalee and Batticaloa districts. In relation to both incidents, investigations commenced promptly and several army personnel were arrested. In the Kumarapuram incident an identification parade was held at which seven army personnel were identified by witnesses. Proceedings were pending in the Magistrate's Court of Trincomalee, but the Magistrate refused to entertain the proceedings for reasons of territorial jurisdiction. On the advice of the Attorney-General, proceedings were transferred to the Magistrate's Court of Mutur where 101 charges have been filed against 7 suspects, who remain in custody. In relation to the Mailantenna incident, 21 army personnel have been committed for trial. The case has been transferred to the High Court of Colombo, which was due to hear the case on 17 September 1997. The suspects remained in custody.

94. Alauwwa, Bolgoda and Diyawanna-Oya incidents. Investigations have been conducted by the CID following the discovery of 21 partly decomposed bodies in Alauwwa (5 bodies), Bolgoda (11 bodies) and Diyawanna-Oya (5 bodies) during the period 31 May 1995 to 14 August 1995. The investigations have not as yet produced any evidence relating to the murder of the 21 persons or the disposal of their bodies. According to the initial findings of judicial medical officers, the cause of death was either strangulation by ligature or drowning. By the external appearances of the bodies, the investigators have concluded that they were persons of Tamil ethnicity. Hence, they have started to

collect information relating to disappearances (if any) of Tamil persons during the relevant period. Information has been collected relating to the disappearances of 15 persons.

95. Thereafter, the investigation has taken two directions. Investigators have collected material relating to the disappearances of these 15 persons. In certain cases, evidence of abduction has been collected. There is no evidence indicating that any of the 15 persons are still alive. Investigators have also attempted to ascertain whether any of the 15 persons were amongst the 21 bodies found. Photographs of the bodies and personal effects found with the bodies have been shown to relatives and friends of the 15 persons, but no identifications have been made.

96. As the next step, the 21 skulls were sent for forensic analysis to the University of Glasgow in the United Kingdom, together with photographs of 14 of the missing persons mentioned earlier, to conduct facial reconstruction and video superimposition of these skulls using, amongst other things, the photographs. The analysis was not able to identify the skulls with certainty, mainly due to the inability to undertake DNA analysis. It is being considered whether further material could be obtained in order to undertake such an analysis.

97. Based on the investigation's findings, 22 suspects have been arrested by the CID. All but one were police officers who, at the time of arrest, had been attached to the Special Task Force headquarters in Colombo.

98. Rape and murder of Krishanthi Kumaraswamy and three others in Jaffna. This incident took place on 7 September 1996 at a security checkpoint manned by a group of military personnel. Prompt action was taken by the police upon receiving the complaint and at the conclusion of the investigations 11 suspects, consisting of 8 army soldiers and 3 police, were arrested, produced before the Magistrate and placed in remand custody. It was decided by the Attorney-General to grant a pardon to two suspects who were not directly involved, on condition that they testify against the others.

99. On the basis of the available evidence, the remaining suspects were charged in the Magistrate's Court of Jaffna under section 357 of the Penal Code for the abduction of Krishanthi Kumaraswamy, and under section 296 for committing the murder of Krishanthi and the three other persons. The case was transferred from Jaffna to Colombo upon the Attorney-General's application. However, giving due consideration to the nature and the circumstances of the offences involved, especially being mindful of the fact that the offences were committed by military personnel against civilians resident in the northern region of the country, a decision was taken by the Attorney-General to forward a direct indictment against the accused to the High Court of Sri Lanka and to have the matter placed for hearing before a trial-at-bar. This course of action will ensure an expeditious consideration of the matter by three judges of the High Court of Sri Lanka. Further, a trial-at-bar will also prevent the matter being heard by a jury, which could aggravate communal tensions. It would be noteworthy to mention that this is an extraordinary step, taken in order to expeditiously mete out justice, and is only the fourth such instance in Sri Lankan legal history.

100. The indictment is against the following eight army soldiers and one policeman: R.D.S. Rajapakse (corporal), J.M. Jayasinghe (soldier), G.P. Priyadharshana (reserve police constable), A.S. Priyashantha Perera (soldier), W.S. Wijayananda Alwis (soldier); D.D. Muthu Banda (soldier), D.M. Jayatilleke (corporal), D.V. Indrajith Kumara (corporal), A.P. Nishantha (soldier).

B. Human Rights Commission

101. The Human Rights Commission of Sri Lanka (HRCSL) was established by Act No. 21 of 1996 and is vested with monitoring, investigative and advisory powers in relation to human rights. It has been set up as a permanent national institution to investigate any infringement of a fundamental right declared and recognized by the Constitution and to grant appropriate relief. The powers of the Commission are said to be wider than those of the Supreme Court and will complement the existing national framework for the protection of human rights. There are no time-limits for filing a complaint before the HRCSL, unlike under the 1978 Constitution.

102. The Commission is made up of five members: three Sinhalese, one Tamil and one Muslim, who were appointed in March 1997. The Commission is headed by retired Supreme Court Judge O.S.M. Seneviratne. The other members of the Commission are:

Dr. A.T. Ariyaratne - Head of Sarvodaya (a humanitarian NGO)
Prof. Arjuna Aluwihare - Former Chairman, University Grants Commission
Mr. T. Suntheralingham - Retired High Court Judge
Mr. Ahmed Javid Yusuf - Former Sri Lankan Ambassador to Saudi Arabia

The appointments were made by the President on the recommendations of the Prime Minister, in consultation with the Speaker and the Leader of the Opposition in Parliament. It should be noted that the opinions of Tamil and Muslim political parties were also sought.

103. The Special Rapporteur was told when meeting the members of the Commission that they were still in the process of recruiting staff to perform legal and investigative functions. Members of the Commission mentioned their difficulties in finding suitable candidates, particularly lawyers. They attributed this difficulty to the fact that they were not proposing adequate salaries. At the time of his visit, there were 7 investigative staff members in Colombo and 33 based throughout the country in Ampare, Kalmoun, Batticaloa, Trincomalee, Vahuniya, Malake and Anrathapura. With regard to Jaffna, the Commission faced some difficulties in opening its office, due to difficulties in recruiting staff. All the employees of the Commission benefit from immunity from prosecution in the course of their functions.

104. Section 14 of the Act provides that the Commission may on its own motion, or on a complaint made to it by an aggrieved person or group of persons, or by a person acting on behalf of an aggrieved person, investigate an allegation of the infringement, or imminent infringement, of a fundamental right of such a person, and where appropriate provide for resolution through mediation or conciliation (sect. 15 (2)).

105. According to section 15 (3) of the Act, where an investigation conducted by the Commission discloses the infringement of a fundamental right, the Commission may recommend to the appropriate authorities that prosecution or other proceedings be instituted against the person or persons infringing such fundamental right. Alternatively, it may refer the matter to any court having jurisdiction to hear and determine such matters. The Commission may also make such recommendations as it may think fit, to the appropriate authority or person or persons concerned, with a view to preventing or remedying such infringement or the continuation of such infringement. The Commission also has the power to order costs where necessary.

106. The HRCSL is also vested with the power to monitor the welfare of detained persons by regular inspection of their places of detention. In order to facilitate this function, all arrests and detentions under the Emergency Regulations, and the Prevention of Terrorism Act must be reported to the Commission within 48 hours of arrest. Wilful failure to report an arrest or detention will attract penal sanctions under the HRSCL Act. Members of the Commission have free access at all times to all prisons of the country, but the Special Rapporteur does not know whether visits could be undertaken without notice.

107. The Act also envisages that the Commission may establish subcommittees at provincial level to exercise certain powers which are delegated by the Commission. This would help create greater awareness of the availability of redress by the Commission and provide easier access to the Commission.

108. Section 29 (1) of the founding legislation stipulates that the State will provide the Commission with adequate funds. It would have been preferable if the word Parliament had been used rather than State, so as to better serve to ensure the independence of the Commission. In contrast, the salaries of the Commission members are determined by the Parliament, as provided for in section 8 of the Act.

109. Section 31.1 of the Act raises another concern regarding the autonomy of the Commission. The section permits the Minister to make regulations "... in respect of any matter which is required by this Act to be prescribed ....". Thus, the authority to create regulations which will affect the Commission rests with one person. Such a provision, when worded in such broad terms, reduces the independence and autonomy of the members. Subsection 2 further permits the Minister to "... make regulations prescribing the procedure to be followed in the conduct of investigations under this Act". One of the most important functions of a national institution relates to its power to initiate investigations upon receipt of a complaint from an individual, but again the Minister has the authority to prescribe the procedure regarding investigations. Subsection 3 provides that any regulations which the Minister makes come into force on the date that they are published in the Official Gazette, unless a later date is specified. It is only afterwards that the regulation is brought before Parliament for discussion. Moreover, subsection 4 is unclear as to when the regulation should be brought before Parliament, stating only that it should be "... as soon as convenient after its publication in the Gazette ....". The regulation will be rescinded should

Parliament withhold its approval. Thus, a regulation which may not succeed in obtaining the approval of the Parliament will remain in force until such time as it is convenient to bring it before the Parliament.

110. The HRCSL has received complaints of human rights violations. It has also had a number of visits from Colombo-based diplomatic missions. The HRCSL subsumed the duties and functions of the Human Rights Task Force (HRTF) on 30 June 1997. At the date of the visit of the Special Rapporteur, no cases of extrajudicial executions had been reported to the Commission.

C. Commissions of Inquiry into Involuntary Removal and Disappearances

111. While in Colombo, the Special Rapporteur met with the President and other members of the Commissions of Inquiry into Involuntary Removal and Disappearances. He was briefed about the activities of the Commissions as follows.

112. Three commissions were appointed by the Sri Lankan Government in January 1995 to inquire into and report on involuntary removals and disappearances from 1 January 1988. This mandate expired on 31 May 1997. Each commission had jurisdiction over a geographical area, namely, the north-east, central and south-west zones. Each commission was responsible for examining the evidence available to establish the allegations, the present whereabouts of the persons concerned, the identity of the persons responsible, the legal action which could be taken and the relief, if any, which could be afforded. It was subsequently ruled that cases of abduction or involuntary removals followed by death also fell within the ambit of these commissions.

113. The commissions submitted interim reports to the President containing the names of the persons responsible for the disappearances, where such evidence was available. The Presidential Secretariat reported that the findings of the reports were forwarded to the IGP for further investigation by a special team, where such investigation was necessary for further legal action. The IGP has also been directed to take action, where appropriate, against offending police officers.

114. On 3 September 1997, the commissions presented their final reports to the President. It was intended that both the interim and final reports would be published and action would be taken on their recommendations, including by initiating prosecutions in those cases where the commissions had found prima facie evidence. However, the final reports have not yet been published and the Special Rapporteur is not aware of any follow-up undertaken by the Government to the findings and recommendations of the commissions. This is particularly important since the commissions can only identify the persons responsible but cannot initiate the necessary legal process required to bring offenders before the courts.

D. Drafting of a new constitution

115. When he met with the authorities in Sri Lanka, the Special Rapporteur was told that the Government was engaged in a process of constitutional reform. The text of 18 chapters of the draft new Constitution of the Republic of Sri Lanka was given to the Special Rapporteur.

116. The fundamental rights under the draft constitution are wider in scope than those in the present Constitution, thus bringing the new Constitution into line with the International Covenants on Human Rights. The Fundamental Rights chapter of the draft constitution introduces a number of new rights not contained in the old chapter, the most important of which are the right to life (art. 8); the right of an arrested person to communicate with a relative or friend (art. 10 (4)); the right to retain legal counsel (art. 10 (5)); the right to be told the reasons for arrest and a 24-hour limit of custody prior to production before a judicial officer (art. 10 (6)); the right to reasonable bail (art. 10 (7) (a)); and the right to be charged or released without unreasonable delay (art. 10 (8)).

117. Government representatives told the Special Rapporteur that the text of the draft new co stitution will be submitted to Parliament. In order to be adopted, it will require a two-thirds majority in Parliament and also the approval of the people in a referendum.

118. The Special Rapporteur encourages any step taken by the Government to bring its national legislation into conformity with international standards, especially human rights standards. In this regard, he hopes that restrictions to the fundamental rights through the application of the ERA and PTA will be lifted. While the fundamental right to life is reflected in the draft constitution, the Special Rapporteur notes that the death penalty is not prohibited. Although the death penalty is not yet prohibited under international law, the Special Rapporteur believes that its abolition is most desirable in order to enhance respect for the right to life.

V. IMPUNITY

119. Effective impunity encourages political violence and is a serious destabilizing element in all contexts of the Sri Lankan socio-political system. Respect for the rule of law is essential to maintain order and stability and to protect human rights in any country. Impunity perpetuates the mass violation of human rights. There have been periodical extrajudicial executions, but few perpetrators have been brought to justice. Furthermore, impunity is an obstacle to democratic development and peace negotiations, and makes reconciliation difficult. This culture of impunity has led to arbitrary killings and has contributed to the uncontrollable spiralling of violence.

120. The systematic absence of investigation, either civil or military, into violations of the right to life facilitates impunity. Investigations are rarely conducted, and when they are, they do not lead to the appropriate convictions or penalties.

121. During the Special Rapporteur's visit to Sri Lanka, most of the human rights advocates with whom he met as well as relatives of victims of human rights violations stated that in Sri Lanka, soldiers and policemen who commit fundamental human rights violations such as killings, torture and acts of disappearances are rarely punished. Neither are they fully held accountable for their acts.

122. Several relatives of disappeared people and human rights organizations from all areas of Sri Lanka have expressed concern that many members of the security forces and others allegedly responsible for grave human rights violations in the recent past continue to hold official posts in the same areas where the violations took place and may try to interfere with the investigations. This was a particular concern in relation to the hearings held by the commissions of inquiry in the areas allocated to them, most notably in the north-east, where concern pertains not only to members of the police but also the army, the home guards and various armed militant groups.

123. The Attorney-General and the Government, throughout its correspondence with the Special Rapporteur with regard to cases of executions in recent years, expressed their willingness and intention to bring to justice members of the security forces believed to be responsible for human rights violations. Unfortunately, the Special Rapporteur notes that little progress has been reported in those cases submitted by him since the creation of the mandate. The Attorney-General said that every effort was being made to expedite those cases, but that the Government had no control over court proceedings and the steps taken by the defence in such cases to protect the interest of the accused. However, while recognizing that the Government cannot intervene once a trial has started, the Special Rapporteur wishes to point out that the Attorney-General himself has recognized that there are delays in actually bringing members of the security forces suspected of involvement in human rights violations to trial.

124. With regard to all the following cases, the Special Rapporteur wishes to stress the importance of carrying out exhaustive and impartial investigations into all allegations of human rights violations, with a view to clarifying the facts, identifying those responsible and bringing them to justice, and granting adequate compensation to the victims or their families. As experience gained in other countries has shown, establishing the truth about the past is essential for preventing renewed human rights violations in the future. The following cases illustrate this point.

125. The case of Richard de Zoysa. Richard de Zoysa, a well-known journalist and actor, was at the time of his abduction and murder in charge of the Colombo office of the International Press Service. De Zoysa lived with his mother, Dr. Saravanamuttu. On the night of 17/18 February 1990, an armed group entered their home, removed Mr. de Zoysa and drove away without explanation. Dr. Saravanamuttu immediately went to the Welikade police station and lodged a complaint. The next day, 19 February 1990, de Zoysa's dead body was found in the sea at Moratuwa, some 12 miles south of Colombo. He had been shot in the head and the throat, and his jaw was fractured. At the inquest the following day, Dr. Saravanamuttu said that she could identify two of the abductors. Three months later, she recognized a man on television as the man who had taken her son. He was a high-ranking police

officer. She informed her solicitor who brought it to the notice of both the Magistrate conducting the inquiry into the incident and the police. However, the suspect was not arrested nor was an identity parade held, nor has Dr. Saravanamuttu's identification been heard by a judicial officer. Both Dr. Saravanamuttu and her lawyer, Batty Weerakoon, have received death threats. Police officers assigned to guard Batty Weerakoon have also received such threats.

126. There are a number of reasons why the investigation into this case is unsatisfactory, and need to be investigated themselves. In principle, it is unsatisfactory that the police investigate matters in which their own members are suspected of being involved. This has been recognized as far back as 1970, when a Commission headed by a former Chief Justice recommended independent machinery to look into such complaints. In addition, there are special reasons for unease regarding the conduct of the police and the way the investigations were carried out. They include the following:

(a) It was possible, in the middle of Colombo, in a residential housing estate, close to the police station, to abduct a well-known personality, in what could be described as a military-style operation. The perpetrators must have felt that they could do this unimpeded, especially as they had alerted a person known to de Zoysa that they were on their way (see below);

(b) A person who knew the victim was forced at gunpoint to disclose de Zoysa's address. He immediately telephoned a friend, who in turn notified a Senior Superintendent of Police of the risk to Richard de Zoysa. This officer in turn rang Welikade police station which is situated very close to de Zoysa's house. Had this telephone call been made and acted on promptly, the Welikade police should have been able to prevent the abduction or apprehend the abductors. (Note that Richard de Zoysa's own house had no telephone so his friends were unable to warn him themselves.);

(c) When the police did arrive at the scene, after the abduction, they did not take the usual investigatory steps such as testing the premises for fingerprints;

(d) Despite the fact that Dr. Saravanamuttu claimed she could identify two of the abductors, she was never asked by the police to give a description of them;

(e) A possible motive for the killing was revealed by the State-owned news agency, Lanka Puwath, which stated that police had informed the agency that investigations revealed that de Zoysa was an activist for the Sinhalese Nationalist Party, the Janatha Vimukthi Peramuna (JVP), and that he had been sending false messages regarding human rights violations overseas. In a written statement read out to Parliament the head of Lanka Puwath said, "I obtained this news item from a reliable police source whom I have found totally responsible and accurate in my past experience". Moreover, the State Minister for Defence had earlier read a statement to Parliament concerning people who were sending "false information" about human rights violations abroad, to influence donors and prevent aid flows to Sri Lanka. A subsequent

news item in a State-controlled newspaper stated that intelligence sources had submitted to the Defence Ministry a list of "80 names of influential people" who had supported the subversives;

(f) Once Dr. Saravanamuttu made the identification of the man who had abducted her son, it was a clear duty of the police to question neighbours and other witnesses as to whether they had seen a person so described on the night of the abduction;

(g) There was a distinct lack of interest on the part of the police to investigate the death threats received by Dr. Saravanamuttu and her lawyer. In the latter's case, the language of the threat, with its reference to foreign aid, clearly reflects the sentiments described in paragraph (e) above. Indeed, several complainants, witnesses and lawyers have been subjected to death threats, harassment, or allegedly killed;

(h) There was apparent collusion between the police and the lawyers for the suspect, to such an extent that the Magistrate felt commpelled to comment, "(a)t this stage I inquire from [prosecutor] Gamini Perera as to whether Mr. Godfrey Gunasekera, who appears with him, is in this court on behalf of the prosecution or to conduct the defence. I have seen him on several occasions secretively whispering certain things to counsel for the suspect". Mr. Gunasekera is a Senior Superintendent of Police who appeared in court that day for the first time, the day the police had been ordered to produce the suspected police officer.

127. This case is an example of the large majority of investigations into human rights violations which in Sri Lanka are not carried out by an authority which is fully independent of those suspected to be responsible for the human rights violations.

128. The Special Rapporteur urges that reports of threats or intimidation of complainants, witnesses, lawyers or others involved in the bringing of those responsible for human rights violations to justice be fully investigated, and legal action taken against those responsible. The Special Rapporteur further urges that adequate protection be provided to anybody threatened in the course of an investigation into human rights violations. He notes that the police officers assigned to protect Batty Weerakoon also received death threats, and it is unlikely that their names and assignments would be known outside police circles.

129. Case of Mr. Sarath Karaliyadda. In a report to the Commission on Human Rights (E/CN.4/1990/22, para. 389), the Special Rapporteur described the case of Mr. Karaliyadda, a lawyer who was found dead on 27 October 1989 together with four other persons, a few hundred metres away from his home in Teldeniya in Kandy district. He was reportedly abducted on 26 October 1989 by three armed men, including one in army uniform. According to the information received, Mr. Karaliyadda had been representing, in a magisterial inquiry, the relatives of a 16-year-old student, Jayantha Bandara, who had been shot by police during demonstrations at Teldeniya in June 1989. It was reported that seven police officers of Teldeniya police station were questioned in the inquiry and that two of the witnesses had been killed since the start of the inquiry. In its reply to the Special Rapporteur (E/CN.4/1991/36,

para. 475 (c)), the Government of Sri Lanka stated that an investigation revealed that on 26 October 1989, eight armed persons dressed in civilian clothes entered Mr. Karaliyadda's house in Teldeniya police area. These persons had ransacked the house and removed jewellery and cash. They led Mr. Karaliyadda away from the house, and his dead body was subsequently found about a quarter of a mile away. A magisterial inquest was held by the Teldeniya magistrate and was to be resumed after further investigations.

130. The Special Rapporteur did not receive any further information regarding this case. It appears that the authorities did not resume the inquiry into the death of Mr. Bandara or hold any further investigations regarding the killing of the lawyer and the witnesses.

131. On 17 May 1985, 23 young men from Naipattimunai, Amparai district, were allegedly arrested by Special Task Force (STF) personnel from Kallady camp and made to dig their own grave. Subsequently, they were allegedly shot. Mr. Paul Nallanayagam, President of the Kalmunai Citizens' Committee, was arrested and charged with spreading rumours and false statements after speaking to foreign journalists about the incident. During his trial before the Colombo High Court in mid-1986, a lot of evidence emerged about the disappearance of the 23 young men but no further action against those responsible has been taken since. Paul Nallanayagam was acquitted of all charges on 17 July 1986. It was reported that the Government of Sri Lanka did not take any action and that the official position remains that none of the disappeared had been arrested. Although a lot of evidence was available at the time about the arrests and subsequent disappearances by the STF, the police did not make any further attempts to investigate the incident.

132. The Special Rapporteur urges the Government to establish a full and impartial investigation into the disappearance and alleged killings of the 23 young men. He is concerned that no action has been taken by the Government to establish the fate or whereabouts of these men, nor who was responsible for their arrest and killing in custody. He hopes that the alleged perpetrators, namely the STF officers, would be brought to justice and that compensation paid to the relatives.

133. Case of Mr. Wijedasa Liyanarachchi. On 2 September 1988, Mr. Liyanarachchi, a lawyer, died while in custody at Colombo hospital with multiple injuries resulting from torture. He had been arrested on 25 August 1988 as a suspected member of the JVP. The alleged perpetrators, three police officers from Tangalle police station, were convicted in March 1991 after the charges against them had been reduced to illegal detention and conspiracy to detain illegally. They were sentenced to suspended sentence and fined. A Deputy Inspector General of Police (DIG) was also suspected of involvement in the illegal arrest and detention of Mr. Liyanarachchi and in attempting to cover up his death due to torture, but has not been charged. The court recommended that investigations be reopened to establish who was responsible for the murder of Wijedasa Liyanarachchi and particularly to investigate the role played by the DIG. The way in which the Government proceeded after the court recommended that investigations be reopened in this case is an indication of the lack of political will to prosecute members of the security forces implicated in human rights violations in this period in the south.

134. Shortly after the judgement, the first accused reportedly committed suicide. The DIG was appointed head of a special police team (Bureau of Special Operations), but subsequently took early retirement. In March 1992, at the request of the CID, the Maligakanda magistrate's court ordered a fresh investigation into the case. It directed that the passport of the retired DIG be impounded to prevent him from leaving the country. He then went underground and issued a number of statements to the press in which he spoke of death squad activities in the south of the country, providing, for instance, a list of 830 persons whom he said had been killed between July and November 1989 in the Central Province. He later repeated these allegations in sworn statements. Instead of ensuring that such serious allegations were properly investigated, the authorities immediately filed a case in the High Court against the retired DIG and several newspapers that had published the statements, charging them with bringing the Government into disrepute and creating disharmony among different communities. Soon afterwards, the retired DIG left the country in circumstances which were not clear. In June 1993, however, he returned. The next day, he appeared in the High Court and was granted bail. The Attorney-General's Department was quoted as saying that they would consider withdrawing the charges against him if in turn he would withdraw the allegations he had made in the various sworn statements. On 8 July 1993, the retired DIG filed such a sworn statement, also implying that some of the earlier statements had not originated with him. The Attorney-General then withdrew all charges relating to the sworn statements. The investigation into his role in the abduction, torture and illegal detention of Wijedasa Liyanarachchi, as recommended by the High Court, remains to be implemented. On 29 July 1993, the retired DIG was appointed Vice-Chairman of the Sri Lanka Ports Authority, a senior position in the government service.

135. The Special Rapporteur believes that those thought to be responsible for extrajudicial executions must be held to account regardless of whether they are officials of a past or current Government, or whether they are members of the security forces or of semi-official paramilitary groups. Those against whom there is sufficient evidence of their involvement in human rights violations should be tried and their trials should conclude with a clear verdict of guilt or innocence. All trials should be conducted in full conformity with internationally recognized norms for fair trial. The present situation does not encourage soldiers and policemen to respect human rights; on the contrary, disproportionate criminal sentencing emboldens policemen and soldiers to continue to violate basic human rights principles.

136. In a report to the Commission on Human Rights (E/CN.4/1993/46, paras. 539, 543), the Special Rapporteur reported that on 29 April 1992, 89 Tamil villagers, including 20 minors, were allegedly killed by a group composed of policemen and Muslim home guards in the villages of Muthugal and Karapola, Polonnaruwa. These killings reportedly took place in reprisal for a massacre, which took place some hours earlier, of 54 Muslim villagers by members of the LTTE. Most of the victims were said to have been shot or hacked to death. Six persons were reportedly captured by home guards in the surrounding countryside, and one person was said to have been taken into police custody. Their bodies were found in an irrigation ditch on the following day. A special investigation into the case was reported to have

been opened, but no disciplinary or judicial procedures were said to have been opened against those responsible, nor did the families of the victims receive any compensation.

137. Information received from the Government of Sri Lanka by the Special Rapporteur is contained in the same report to the Commission (para. 543). The Government stated that the attacks had been carried out by Muslim villagers from a nearby village, in retaliation for an earlier attack by LTTE "terrorists" which had cost the lives of 56 people. This was part of the ethnic cleansing strategy used by the LTTE to drive Muslim and Sinhalese villagers out of the territory they claimed as their homeland. In the reprisal attack on Muthugal and Karapola, 74 Tamil villagers were killed and 44 others wounded. The Ministry of Defence of Sri Lanka appointed a committee to inquire into the two attacks, with a view to ascertaining who was responsible and establishing whether there was any lapse on the part of the security personnel, and to recommend measures to prevent the recurrence of incidents of this nature.

138. On 22 September 1993, the Special Rapporteur sent a follow-up letter to the Government of Sri Lanka in which he referred to a reply received from the authorities in 1992 concerning the killing of 130 villagers in Alanchipothana, Karapola and Muthugal in April 1992 (see E/CN.4/1993/46, paras. 539 and 543). The Government informed him that a committee chaired by a retired judge of the Supreme Court had been appointed to inquire into the killings. The Special Rapporteur requested to be kept informed about the progress of the investigations. He also asked the Government to provide him with detailed information about the working of the committee, in particular the legal basis for its inquiries, the procedures followed, its relations with other, judicial or administrative, investigations, etc.

139. On 30 and 31 December 1993, the Government provided the Special Rapporteur with information in reply to his letter of 22 September 1993, (see E/CN.4/1994/7, para. 555). The Government informed the Special Rapporteur that a three-person committee, appointed by the Ministry of Defence to investigate the incidents, had presented a confidential report containing conclusions and recommendations. The committee had found that the killings at Karapola and Muthugal were carried out by villagers and some home guards of Alanchipothana, in reprisal for the earlier killings by the LTTE at their village. Reportedly, the Karapola police post did not attempt to prevent the violence. The committee also stated that there had apparently been no control over the issue of arms and ammunition, particularly to home guards, and recommended, inter alia, a disciplinary code of conduct for the home guards who should be placed under a defined authority such as the army or the police; the creation and training of a paramilitary force to supplement the home guards in the defence of border areas against the LTTE; investigations into all complaints and action, if necessary, against any member of the group.

140. In a letter dated 23 September 1994, the Special Rapporteur requested further details on the investigation carried out by the committee, particularly with regard to the date on which the report was submitted and the follow-up given to the recommendations. The Special Rapporteur also inquired whether anyone had been brought to justice in connection with the killings at

Alanchipothana, Karapola and Muthugal, and whether any judicial or disciplinary measures had been taken with regard to those based at the Karapola police post.

141. While welcoming the Government's prompt action to investigate this incident, the Special Rapporteur is concerned that the full report of the committee's findings has not been made public. The Special Rapporteur has not received any further information about the prosecution of police officers, home guards and villagers allegedly involved in the reprisal killings of the villagers of Muthugal and Karapola. The Special Rapporteur has also received reports about two further instances of reprisal killings, where police investigations were announced without any independent investigative body being appointed. The first took place at Mailanthanai in Batticaloa district on 8 August 1992. Twenty-four soldiers were accused on 83 charges relating to the murder of 39 Tamil men, women and children. The preliminary hearings in the case were concluded at Polonnaruwa Magistrate's Court in March 1994, having been transferred there from Batticaloa without any explanation in mid-1993. Of the 24 soldiers, 3 were discharged and 21 were committed to stand trial in the High Court. The second case in which a police investigation was ordered is the reported killing by soldiers of about 10 people at Velaveli in Batticaloa district on 24 October 1992. The then Prime Minister Dingiri Banda Wijetunga was reported as saying that these killings would be investigated by the police, but there has been no subsequent evidence that an investigation had started.

142. Through the above-mentioned cases of executions, it appears that the most severe punishment ever handed out to human rights violators is suspension from duty, despite the gravity of the offences, including extra-legal executions, with which they were charged. While civilians who peacefully exercise their fundamental civil and political rights are charged and sentenced to years of imprisonment, soldiers and policemen who flagrantly violate the rights of innocent civilians are charged before their own peers and sentenced to only months of imprisonment. This situation encourages impunity. The Special Rapporteur believes that penalties should be imposed that relate to the seriousness of the offences in order to deter further human rights violations. Respect for the rule of law cannot be promoted unless all trials are conducted in full conformity with internationally recognized standards.

143. Impunity for those responsible for human rights violations remains a serious concern. Progress in a few court cases against members of the security forces charged in connection with disappearances and extrajudicial executions is slow, as are investigations into many other cases. While in Colombo, the Special Rapporteur met with Mr. W.C.N. Rajapakse who recounted the case of his sister, Ms. W.W. Chandrawathie. She was 22 years old when, on 26 September 1990, she was forcibly taken from her house in Eppawala, Anuradhapura district, by a sub-inspector of police accompanied by other officers of the Eppawala police station. According to her father and other relatives, she was dragged to the nearby jungle and allegedly raped by the sub-inspector, who subsequently shot her. They also alleged that her body was later burnt on tyres at a nearby quarry. Officials at the local police station refused to assist the family when they attempted to lodge a complaint.

Her family then contacted the Deputy Inspector General of Police of the area, who initiated investigations, the results of which were presented to the Magistrate's Court.

144. As a result of the magisterial inquiry into the rape and death of Ms. W. Chandrawathie, it has been alleged that her relatives received several death threats. Her brother, Mr. Rajapakse, was allegedly arrested on the first day of the inquiry by members of the Anuradhapura police and held at Anuradhapura police station for 12 days, during which time he was allegedly beaten. The father of the victim and one of several people who identified the sub-inspector and a constable as being responsible received several threats.

145. The Government of Sri Lanka has repeatedly announced that relevant authorities have been asked to expedite court cases against members of the security forces suspected of human rights violations. It appears, however, that this case has been postponed six times now. When in Colombo, the Special Rapporteur met with the victim's brother and was informed that in the meantime, his father had died without living to witness the offenders being brought to justice. He was also told that witnesses could not afford to travel to Colombo only to have the case postponed. The continual delays were time-consuming and a financial burden for the family and the witnesses.

146. The Special Rapporteur brought this case to the attention of the Attorney-General during their meeting and he was told that the trial had been fixed for 20 October 1997 in Colombo High Court.

147. The Special Rapporteur stresses the need to re-establish accountability among the security forces by bringing to justice those responsible for past human rights violations, for the sake of the victims and their relatives, and also to prevent such abuses from happening again. A system of compensation for the families of victims should be developed, as well as a system to protect witnesses and their families who participate in criminal investigations and give testimony.

VI. CONCLUSIONS

148. The visit of the Special Rapporteur to Sri Lanka, at the invitation of the Government, was facilitated by the efforts, cooperation and courtesy extended to him by the officials of the Government. All requests from the Special Rapporteur to meet with government representatives were met, except for the meeting with the President and Secretary of Defence.

149. The Special Rapporteur wishes also to express his appreciation to the UNDP Resident Representative for facilitating his stay in Colombo and his visits to Jaffna, Batticaloa and Ratnapura.

150. The Special Rapporteur is of the opinion that the question of extrajudicial and arbitrary executions in Sri Lanka is serious, and results from the interaction of multiple factors. The principal cause is the prevailing abuses against the right to life which has taken root within the internal armed conflict. The perpetrators are the armed forces and police themselves, who kill suspected insurgents and civilians perceived as supporting them; LTTE members who kill members of the security forces, members

of opposing factions, those who refuse to continue the armed insurgency or to continue to support the LTTE, including civilians; paramilitary organizations allegedly linked to the security forces (home guards) who are also responsible for extrajudicial executions.

151. Human rights violations are most frequent in the context of operations carried out by the security forces against the armed insurgency. While considering it inappropriate to affirm the existence of a planned policy of "systematic violation" of human rights, the violations have been so numerous, frequent and serious over the years that they could not be dealt with as if they were just isolated or individual cases of misbehaviour by middle- and lower-rank officers, without attaching any political responsibility to the civilian and military hierarchy. On the contrary, even if no decision had been taken to persecute the unarmed civilian population, the Government and the high military command were still responsible for the actions and omissions of their subordinates.

152. The pervasive violence generated by armed LTTE members and their increasing attacks against the armed forces and civilians are further indicators of the general deterioration of the situation and the prevalent insecurity in certain parts of Sri Lanka.

153. The Special Rapporteur understands the difficulties faced by the Government when confronted with insurgents and other armed groups who are responsible for numerous acts of violence and clearly lack respect for the lives and physical integrity of State agents and civilians. However, this does not justify excessive and arbitrary use of force on the part of the security forces. There is no excuse for extrajudicial, summary or arbitrary executions, nor for their encouragement through impunity.

154. The Special Rapporteur is particularly concerned about the massacres and extrajudicial, summary or arbitrary executions among the civilian population, especially women and children, which have become an almost ubiquitous feature of daily life in Sri Lanka.

155. The Special Rapporteur is concerned about the numerous reports he received which indicate that in many cases of violations of the right to life no compensation was provided.

156. The Special Rapporteur is also concerned about certain laws and regulations which have been enacted in Sri Lanka and which allow impunity to persist and which in some cases grant security officers immunity from prosecution. Of particular concern are the emergency regulations governing arrest and detention procedures and those governing post-mortems and inquests when deaths have occurred in custody or as a result of the official action of the security forces.

157. The Special Rapporteur is also worried by the paralysis of State institutions, particularly the judiciary in the areas of armed conflict, which is generating impunity and hence the perpetration of human rights violations.

158. The Special Rapporteur remains concerned at the contrast between statements indicating high sensitivity to, and awareness of, human rights issues at the top level of the armed forces and their practices in the field, which very often fail to respect human rights.

159. Impunity enjoyed by human rights violators in Sri Lanka is very pervasive. The judiciary is competent to deal with cases involving security forces personnel accused of human rights violations. The justice system can be tough and effective in prosecuting and punishing disciplinary offences involving manifest disobedience of orders. However, it has proved itself equally effective in guaranteeing impunity for violations of the ordinary criminal law in respect of acts (murder, torture, kidnapping) committed in the line of duty. Thus, Sri Lanka fails to fulfil its obligations under international law to carry out exhaustive and impartial investigations with a view to identifying those responsible, bringing them to justice and punishing them. Although in a number of cases, tribunals have granted compensation to victims, or their families, for damages suffered at the hands of state agents, the tribunals conducting criminal proceedings against the same agents do not find grounds for their conviction. This strongly suggests the lack of institutional willingness to hold the authors of human rights violations responsible.

160. Neither the Sri Lankan population, the main victims, nor the international community, a powerless witness to the frequent killings and disappearances, seem capable of halting the violence. The failure by the Sri Lankan authorities to take concrete measures which would have immediate effect and put an end to this violence and further prevent its degeneration into a civil war has also contributed to shaping the present situation.

161. The Special Rapporteur would like to stress the importance of linking the humanitarian and human rights issues involved in the challenge of peace. Throughout his mission, he stated that without peaceful management or resolution of the conflict, there can be no effective and durable answers to the problem of the protection of the right to life. Throughout his discussions with Sri Lankan authorities, individuals and representatives of non-governmental organizations, he felt that there was an understanding that unless a political solution to the conflict is found, there can be little hope of ending it. Some of the authorities are trying to differentiate between the LTTE as an insurgent group and the Tamils as a community which is entitled to political rights equal to those of any other citizen in Sri Lanka. In making this differentiation, they are considering continuing the war with the LTTE and finding a political solution with the Tamils. However, there appeared to be a determined desire on the part of the armed forces, who control the military situation, to privilege a military solution.

162. It will only be possible for the State to reassert itself effectively, that is, with the respect and support of the population, if it can reform itself in the area that is central to the legitimacy of any State, namely, the establishment of the rule of law. Of course, this cannot be done in a vacuum. There needs to be serious attempts made to pacify the country, not just by using discrediting counter-insurgency techniques which violate international human rights and humanitarian law, but also by seeking a political accommodation. The importance of peace for the enjoyment of human rights in

areas of insurgent activities and military counter-insurgency operations cannot be overemphasized. In this regard, the Special Rapporteur welcomes the efforts made by the Government with a view to restoring a normal life in Jaffna.

163. Finally, on several occasions, the Government of Sri Lanka has acknowledged the existence of problems relating to violations of human rights and repeatedly declared its commitment to act on them. The Special Rapporteur welcomed measures taken by the Government of Sri Lanka to strengthen the protection of human rights, through the establishment of the Human Rights Commission, and the three commissions of inquiry into past disappearances, but he feels that a lot has yet to be done in order to ensure that these institutions can operate as effective instruments.

164. The recommendations that follow are aimed at reinforcing and supporting the efforts of the Sri Lankan Government to translate its commitment into reality. Particular emphasis is laid on measures that could contribute to the prevention of further human rights violations.

VII. RECOMMENDATIONS

165. The Special Rapporteur acknowledges that peace would create the most favourable circumstances for improving the human rights situation in Sri Lanka. He therefore urges all the parties to the armed conflict to seriously seek and negotiate a peaceful solution to the conflict and, to the extent that the parties would find this helpful, suggests that the United Nations would be willing to assist in this process. However, no such peace agreement should create obstacles to providing justice for the victims of human rights violations within the mandates of the Special Rapporteur.

166. The Special Rapporteur considers it of the greatest importance to create a mechanism which would encourage confidence-building between the Sinhalese and the Tamils. Such a mechanism would aim at providing security and protection to all the people of Sri Lanka. In this regard, the Government of Sri Lanka should refer to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and, in that context, should take all measures required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law.

167. Reform and transformation of the security forces of Sri Lanka are needed in order to allow Tamils equal access to them; the security forces may thus come to represent the whole society, and hence enjoy the confidence of the population.

168. All efforts which might be initiated by the Government of Sri Lanka to coordinate the functions of all the security forces responsible for ensuring law and order should be strengthened. The training programmes provided by the Office of the High Commissioner for Human Rights for the security forces and which is being implemented in other countries might be a possibility. They should take into account the need to provide specialized and distinct training

to both army and police officers. The relevant international standards developed by the United Nations, such as the Code of Conduct for Law Enforcement Officials, should be part of such training.

169. All sources consulted agree on the quasi-monoethnic composition of the army. Predominantly Sinhalese, the army has recruited more on the basis of ethnicity than on a truly national basis. This has provoked grave suspicions that the army is prejudiced, a fear fuelled by the fact that repeated searching operations are carried out mainly against Tamils, and that the army personnel do not speak the Tamil language. Changing the recruitment policy, perhaps by means of a quota for Tamils, should be considered. Enhancing cultural sensitivity among the soldiers should also be considered.

170. Within this context, it is important that the national police force be accepted by both communities and have as its main responsibility the protection of the civilian population and the prevention of communal violence. One of the priority tasks of the national police force would be to ensure the security and protection of all people in Sri Lanka. The police should be given the requisite substantive training in order to enable it to fulfil its role of maintaining public order. However, all elements of the police who have been involved in summary executions, massacres or other grave violations of human rights should be excluded from the national police force.

171. The armed forces must be required to accept as a priority the taking of effective action to disarm and dismantle armed groups, especially the home guards, many of which they have set up and/or cooperated with closely. Given the numerous abuses committed by such groups, as well as their ambiguous status, this is a necessity. Furthermore, it would go some distance towards establishing the credentials of the armed forces as impartial upholders of the rule of law. It would also begin to make a reality of the democratic State's need to have a monopoly over the use of force, within the limits established in the pertinent international standards.

172. If they are not disarmed or dismantled, any such auxiliary force should be subject to strict control by the security forces. The Special Rapporteur recommends, inter alia, a disciplinary code of conduct for the home guards who should be placed under a defined authority such as the army or the police. In view of the experience of other countries where paramilitary groups are responsible for numerous and grave human rights violations, the Government may prefer to strengthen the regular security forces in areas of armed conflict, rather than creating a paramilitary body.

173. The Special Rapporteur also recommends that efforts to disarm the civilian population be intensified and their efficiency increased. Strict control of weapons in the possession of civilians would be an important measure, with a view to lowering the level of common and political crime and violence in Sri Lanka.

174. Adequate provision should be made for the protection of all those who have laid down their arms and are willing to reintegrate themselves into civilian life. In particular, former combatants who organize themselves in political movements to participate in the democratic process should be able to do so without fear of suffering reprisals.

175. While initiatives to raise awareness of human rights among members of the security forces and the population in general through educational and other measures are to be welcomed as a necessary step, the Special Rapporteur wishes to emphasize that respect for, and thus enjoyment of human rights can only be improved if impunity is effectively fought. The Special Rapporteur calls on the Government to fulfil its obligation under international law to conduct exhaustive and impartial investigations into all allegations of extrajudicial, summary or arbitrary executions and torture; to identify, prosecute and punish those responsible; grant adequate compensation to the victims or their families; and take all appropriate measures to prevent the recurrence of such acts.

176. The need to bring the perpetrators of extrajudicial executions to justice has been established as an obligation in international human rights standards. Paragraph 18 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions provides that "[G]overnments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions ... are brought to justice ... This principle shall apply irrespective of who and where the perpetrators or the victims are, their nationalities or where the offence was committed." The Principles also provide that persons alleged to have committed these grave human rights violations should be suspended from any official duties during the investigation and removed from any position of control or power, whether direct or indirect. They also state that steps should be taken to ensure that all those involved in the investigation, including the complainant, counsel, witnesses and those conducting the investigation, are protected against ill-treatment, violence, threats of violence or any other form of intimidation or reprisal.

177. The Special Rapporteur urges that all necessary steps be taken to minimize the delays in bringing to trial members of the security forces suspected of committing human rights violations.

178. The Government and prosecuting authorities should take follow-up actions to conclude the cases that have already been initiated by the State.

179. The Government should act in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power which provide, inter alia, that victims should be entitled to access to the mechanisms of justice and to prompt redress for the harm that they have suffered. Families of the deceased and their legal representatives shall be informed of, and have access to any hearing as well as to all information relevant to the investigation, and shall be entitled to present other evidence. The family of the deceased shall have the right to insist that a medical or other qualified representative be present at the autopsy. When the identity of a deceased person has been determined, a notification of death shall be posted and the family or relatives of the deceased shall be informed immediately. The body of the deceased shall be returned to them upon completion of the investigation.

180. The rights of victims or their families to receive adequate compensation is both a recognition of the State's responsibility for the acts committed by its personnel and an expression of respect for the human being. Granting

compensation presupposes compliance with the obligation to conduct investigations into allegations of human rights abuses with a view to identifying and prosecuting the alleged perpetrators. Financial or other compensation provided to the victims or their families before such investigations are initiated or concluded, however, does not exempt Governments from this obligation.

181. A system of compensation for the families of victims should be developed, as well as a system to protect witnesses and their families who participate in criminal investigations and give testimony.

182. With regard to persistent allegations of deaths of civilians in military counter-insurgency operations, the Special Rapporteur calls on the authorities to take all necessary measures to ensure full respect for the restrictions on the use of force and firearms contained in the pertinent international instruments. Counter-insurgency operations by the armed forces must be carried out in full respect for the rights of the civilian population. Under no circumstances should the army use heavy weapons against the civilian population, as has been the case on several occasions.

183. The excavation, exhumation and evaluation by experts in the forensic sciences of remains which may belong to victims of extrajudicial, summary or arbitrary executions are an integral part of the obligation to conduct thorough investigations as referred to above. They must be carried out in accordance with the highest standards of expertise by specialists in forensic archaeology, anthropology, pathology and biology. In this context, the Special Rapporteur wishes to refer to the Model Protocol for Disinterment and Analysis of Skeletal Remains, included in the Manual for the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, a United Nations publication. The Special Rapporteur calls on the Government to ensure that the necessary forensic expertise and ballistic analyses are made available throughout the country with a view to obtaining maximum evidence in each case under investigation. In this regard, the Government of Sri Lanka might wish, through the Office of the High Commissioner for Human Rights, to request the assistance of international forensic experts to aid local experts in establishing a local forensic unit.

184. The Special Rapporteur calls on the authorities to take the necessary steps with a view to strengthening the ordinary justice system in Jaffna so as to make it more efficient in all circumstances. To this effect, there should be an allocation of the necessary human and material resources to carry out prompt and effective investigations into alleged human rights violations. For instance, it might be necessary to have more courts than only the High Court in Colombo to inquire into deaths which fall under the ERA.

185. The Government of Sri Lanka should consider accession to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. The Government of Sri Lanka is also urged to sign Protocol II Additional to the Geneva Conventions of 12 August 1949.

186. The emergency regulations should be revised in order to bring them into line with accepted international standards. These reforms would need to include the following elements:

(a) Removal of provisions which dispense with post-mortems and inquests when deaths have occurred in custody or as a result of official action of the security forces. This could be simply done by returning to normal inquest procedures under ordinary law;

(b) The Government should allow public access to the records of all inquiries, into deaths in custody or as a result of action by the security forces held in the High Court under the provisions of the ERs;

(c) Time-limits for bringing a person before a judge following his arrest should not exceed a reasonable maximum time-limit;

(d) The emergency regulations should be compiled and codified.

187. The fundamental right to life should be reflected in the new Constitution and the death penalty abolished in order to fully reflect the de facto situation.

188. The Government should publicize the reports of the three commissions which examined the cases of alleged disappearances, and prosecuting authorities should prepare cases against identified offenders.

189. Legislation for the issuance of death certificates in respect of missing persons should be enacted and provincial mechanisms for the implementation thereof should be established.

190. The Human Rights Commission should be strengthened, in accordance with the Principles relating to the status of national institutions (Paris Principles), annexed to Commission on Human Rights resolution 1992/54 and General Assembly resolution 48/134. Such an institution should be based on the recommendations of the Commission on Human Rights concerning the competence, responsibilities, composition, guarantees of independence and pluralism, methods of operation, status and functions of national human rights institutions. The Human Rights Commission might consult the Office of the High Commissioner for Human Rights for advice and technical cooperation in this particular field. Such a Commission should, inter alia, be able to achieve the following goals:

(a) Give a full public accounting of the scope and extent of the crimes committed in the name of the State and the political and institutional factors that contributed to the impunity of their authors;

(b) Formally identify the individual responsibility for such crimes, including the direct perpetrators and those who may have given the explicit or implicit orders for their commission;

(c) Instigate the corresponding criminal and disciplinary proceedings, to be carried out by the competent organs;

(d) Ensure effective reparation to the victims or their dependants, including adequate compensation and measures for their rehabilitation;

(e) Make recommendations that would help to prevent further violations in the future.

Members of the Commission should have access to all places of detention without prior notification, be assured of repeated visits and meet prisoners in private.

191. The Government of Sri Lanka should continue to elaborate and implement without delay the policy to improve security, which would enable the displaced and dispersed Tamil populations of the country to return to their homeland and would facilitate their reintegration and reinstallation. The international community should be ready to respond to requests by the Government of Sri Lanka for assistance in this matter.

192. The Government of Sri Lanka should also implement the recommendations made by the representatives of various United Nations human rights mechanisms that visited Sri Lanka, such as the Working Group on Enforced or Involuntary Disappearances and the Special Representative of the Secretary-General on internally displaced persons.

193. The level of violence, both politically motivated and due to the internal conflict, has risen in the recent past, despite legislative reforms and other initiatives taken by successive Governments. The current Government recognizes the gravity of the human rights situation, has identified its causes, in particular impunity, and has repeatedly expressed its willingness to take radical measures to redress the situation. It is clear that the Government will encounter resistance from various powerful quarters defending their interests. The Special Rapporteur believes that the international community should support the Government's efforts to translate its expressed political willingness into practice. The advisory services and technical assistance programme of the Office of the High Commissioner for Human Rights should consider favourably any request from the Government of Sri Lanka to help it to put the above recommendations into effect. The involvement in this process of the United Nations Development Programme (which already provides assistance to the Government on human rights issues) would be welcome. In this context, the Special Rapporteur wishes also to emphasize the importance of the role of non-governmental human rights organizations in Sri Lanka and the need to strengthen them and provide them with adequate protection. Their full participation in human rights assistance programmes is essential for their effectiveness.

194. The Government of Sri Lanka should establish a national institution to find ways and means for national reconciliation. This institution will provide a forum for a discussion on crucial issues facing Sri Lankan society - peace, security and confidence-building measures to attain protection of human rights, the protection of minorities, strengthening of democracy, reconciliation and coexistence, national unity and restoration of confidence in the institutions of the Government. Non-governmental organizations and civil society should be fully involved in this process.